OCTOBER, 1958
Volume 3, Number 5

Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

VANDERBILT UNIVERSITY SCHOOL OF LAW

VANDERBILT UNIVERSITY
SCHOOL OF LAW

HARVIE BRANSCOMBE, PH.D., LITT.D., LL.D., D.H.L., *Chancellor*
CHARLES MADISON SARRATT, M.A., LL.D., D.C.L., *Vice-Chancellor Emeritus*
JOHN H. STAMBAUGH, *Vice-Chancellor*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Dean of the School of Law*
KATHLEEN B. LEONARDT, B.A., *Registrar and Administrative Assistant to the Dean*

WILLIAM R. ANDERSEN, B.S., LL.B., LL.M., *Assistant Professor of Law*
PAUL J. HARTMAN, A.B., LL.B., LL.M., JUR. SC. D., *Professor of Law*
ROBERT E. KENDRICK, B.S., M.A., LL.B., LL.M., *Visiting Associate Professor of Law*
EDMUND M. MORGAN, A.B., A.M., LL.B., *Frank C. Rand Professor of Law*
F. HODGE O'NEAL, A.B., LL.B., J.S.D., S.J.D., *Professor of Law*
LEO J. RASKIN, B.A., M.A., PH.D., LL.B., *Associate Professor of Law*
THOMAS G. ROADY, JR., A.B., M.A., J.D., *Professor of Law*
PAUL HAMPTON SANDERS, A.B., LL.B., *Professor of Law*
THEODORE A. SMEDLEY, A.B., J.D., *Professor of Law*
HERMAN L. TRAUTMAN, B.A., LL.B., *Professor of Law*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Professor of Law*
JOHN HOWARD MOORE, A.B., J.D., *Professor of Law Emeritus*

W. RAYMOND DENNEY, LL.B., *Lecturer in Law*
WILLIAM J. HARBISON, B.A., LL.B., *Lecturer in Law*
EDWIN F. HUNT, B.A., LL.B., *Lecturer in Law*
JAMES C. KIRBY, JR., B.A., LL.B., *Lecturer in Law*
CECIL SIMS, LL.B., *Lecturer in Law*
ROBERT W. STURDIVANT, LL.B., *Lecturer in Law*
WILLIAM WALLER, B.S., LL.B., *Lecturer in Law*
CHARLES H. WARFIELD, B.A., LL.B., *Lecturer in Law*

EUGENE G. WYATT, JR., B.A., LL.B., *Associate Director, Race Relations Law Reporter*

KAYWYNNE WEILER ADAMS, *Secretary to the Faculty*
MARY ELIZABETH POLK GREEN, B.A., LL.B., *Assistant to the Director of the Law Library*
BETTY CARROLL JONES, *Secretary to the Law Review*
SUSAN R. MUIR, *Secretary to the Faculty*
CORNELIA L. ROUNTREE, B.A., M.A., *Secretary to the Dean*
EVELYN ROYALTY, *Secretary to the Race Relations Law Reporter*
PAULINE F. WOODARD, *Assistant to the Director of the Law Library*

Bulletin or other information will be supplied on request. Write Vanderbilt University, School of Law, Nashville 5, Tennessee.

Recent Developments . . . A Summary

For a summary of developments in the *Little Rock* school situation, see pages 851-52.

Education

A United States District Court has found that school officials in Van Buren, *Arkansas,* were not responsible for disturbances which had caused Negro students to withdraw from schools, but rather had attempted in good faith to comply with the gradual desegregation plan instituted last year (p. 895).

Also in *Arkansas,* a state court has held constitutional a 1957 statute creating a "State Sovereignty Commission" authorized to provide advice and legal assistance to school districts upon integration matters (p. 978). A special session of the Arkansas legislature convened by order of Governor Faubus (p. 1037), enacted measures relating to operation of the public schools (pp. 1042-51).

The Third Circuit Court of Appeals has upheld a decree ordering the *Delaware* State Board of Education to submit a plan for desegregating that state's schools in all districts (p. 901), and authorizing the creation of separate classes for white and Negro students in certain situations (p. 901).

A district court's dismissal of a suit to compel the Palm Beach County, *Florida,* school board to transfer a Negro child to a white school has been reversed by the Court of Appeals for the Fifth Circuit (p. 907).

The *Louisiana* legislature passed bills providing for a study of the efficiency of public education and establishing an interim school placement program (p. 1059) and authorizing expense grants for children in non-sectarian private schools where no segregated public school is provided (p. 1062).

In *Maryland,* the federal district court held that sufficient justification had not been shown for denial of an eleventh grade child's application to attend a desegregated school, the county (St. Mary's) having already instituted integration through grade nine (p. 910).

A class action filed by a Negro student against the Charles County, *Maryland,* Board of Education to establish his right to ride a desegregated school bus, was dismissed as moot by the same court after the board announced a policy of deciding transportation problems on an individual basis and approved the boy's request (p. 973).

The same court dismissed a Negro teacher's suit against school officials of Prince George's County, *Maryland,* which sought to recover a salary differential as against white teachers incurred over a period of years (p. 975).

The actions of the school board of Pontiac, *Michigan,* in erecting a school building in a Negro residential area and in altering attendance districts to compel all children of appropriate age in the residential area to attend the new school, has been held not to be discriminatory by a United States district court (p. 914).

A Negro boy's suit for admission to a Raleigh, *North Carolina* white public school was dismissed by the federal district court because of failure to exhaust administrative remedies under state law (p. 917).

The Norfolk, *Virginia* School Board, instructed to act with reasonable promptness upon applications of Negroes to enter white schools for transfers, announced in August that it had considered and rejected 151 applications for transfers (p. 945). After receiving the district judge's interpretation of the proper constitutional criteria for pupil assignment (p. 946), the board reconsidered and assigned 17 Negro students to white schools (p. 955). Following a court order for the admission of those Negroes, the board ordered them admitted to specified white schools. Thereupon, the governor ordered the affected schools closed (p. 963). Under similar circumstances, the governor closed schools in Charlottesville, *Virginia* and when an attempt was made to operate "private" schools in the county with city-paid teachers, the federal district court enjoined salary payments from public funds (p. 937). The governor also closed schools in Warren County, *Virginia* after a federal court had enjoined the school board from

denying admission of certain Negro children to white schools (p. 972).

After Newport News, *Virginia*, was ordered by a United States district court to desegregate its schools, it merged with a neighboring city. A temporary injunction restraining the municipal school board from denying admission of Negroes to public schools was denied in September because the school term had already begun, but the case has been set for hearing on its merits (p. 938).

In one of the original *School Segregation Cases*, a federal district court directed by the Court of Appeals for the Fourth Circuit to set a time limit for compliance by Prince Edward County, *Virginia*, school officials with the Supreme Court's 1955 decree, fixed ten years following the date of that decree (p. 964).

The School Board of Arlington, *Virginia*, has been ordered by a United States district court to grant transfers to 4 Negro students to white schools. As to the denial of 26 other requests for transfers, the court found considerable supporting evidence.

Elections

The Louisiana Legislature has authorized the state's attorney to defend registrars in actions involving federal voting rights (p. 1066). It also has extended the prohibition on selling votes to include registrations (p. 1059).

A United States district court has dismissed a suit charging the Registrar of Voters of Ouchita Parish, *Louisiana*, with segregating races in her office on the finding that the arrangements complained of had ceased before the suit was filed (p. 984).

Organizations

An Act of the 1957 *Arkansas* legislature requiring registration, records of contributions and expenditures, and periodic reports by persons and organizations promoting school desegregation by legislation or litigation has been held constitutional by a state chancery court (p. 978). Acts have been passed by the 1958 extraordinary session requiring the filing of certain information by organizations actively "interfering" with operation of the state's schools (p. 1054), and authorizing the state attorney general to visit the offices of such organizations to inspect records and procure evidence of tax evasion (p. 1056). This session also enacted legislation dealing with the offenses of maintenance and barratry (pp. 1052, 1053, 1057).

Miscellaneous

The Federal Commission on Civil Rights has issued by-laws to govern the operation of its state advisory committees (p. 1069). Governor Griffin of *Georgia* has ordered the state militia not to obey any directive from the United States government until its constitutionality is certified by the governor (p. 1081).

The *Louisiana* Legislature has passed a statute providing for the labeling of human blood and requiring the consent of the person receiving a transfusion, or his next of kin, before blood from a person of a different race may be used (p. 1065). The Municipal Court of Appeals for the *District of Columbia* has held that common law principles regarding the duties of an innkeeper to a guest are inapplicable in a case of alleged discrimination by a restaurant proprietor against a Negro guest (p. 1029).

The *Race Relations Law Reporter* is published six times a year, February, April, June, August, October, and December, by Vanderbilt University School of Law, Nashville 5, Tennessee. Entered as second-class matter February 24, 1956 at the post office at Nashville, Tenn., under the Act of March 3, 1879. Subscription price $3.00 per year. If purchased separately, $1.00 per regular issue. Printed by Rich Printing Co., 150 10th Ave., N., Nashville, Tennessee.

TABLE OF CONTENTS

ANTI-DISCRIMINATION COMMISSIONS: A background study of the structures, functions, and operational areas of state and local anti-discrimination commissions. **Page 1085**

CUMULATIVE TABLE OF CASES: A listing in original and reverse form of court and administrative cases in the five issues of Volume III. **Page 1109**

LITTLE ROCK

. . . A Special Report

Background:

The original Little Rock school desegregation case was filed as a class action in February, 1956, by the parents of a group of Negro school children. It sought a declaration of the plaintiffs' right to attend public schools without discrimination, and an injunction against enforcement of Arkansas constitutional and statutory provisions requiring public school segregation.

The answer of the school officials conceded the invalidity of those provisions and noted that the school board had announced shortly after the decision in the *School Segregation Cases* that it intended to abide by the ruling, beginning desegregation in 1957 with the high school grades, and extending over a period of approximately six years.

The district court approved the plan as a "prompt and reasonable start" toward full integration and retained jurisdiction of the case, without issuing an injunction, to supervise implementation of the plan. 143 F.Supp. 855, 1 Race Rel. L. Rep. 851 (E.D. Ark. 1956).

The Negro plaintiffs appealed this as not requiring "a reasonable start." The Court of Appeals for the Eighth Circuit affirmed, and distinguished several decisions of other federal courts requiring earlier integration. The factors in each locality, the court said, must be considered, and in this case it could not hold that the time allowed was unreasonable. 243 F.2d 361, 2 Race Rel. L. Rep. 593 (1957).

Just prior to and at the beginning of the 1957 school term, a number of legal developments occurred resulting in an order of the President sending United States armed forces to restore order and enforce the court's decrees. For a chronological treatment of these developments, see 2 Race Rel. L. Rep. 931-65 (1957). The 1957-58 school year was completed with units of the armed forces in the school.

On February 20, 1958, the school officials filed a petition in federal district court alleging that the situation of unrest created by public opposition to integration made it impossible to maintain a satisfactory educational program. The petition, as amended, requested the court to permit the defendants to suspend the operation of the plan for gradual integration until January, 1961. This petition was granted on June 21. The court found that the current situation was unforeseeable when the plan was approved, and noted that certain 1956-57 legislative enactments of the Arkansas general assembly pertaining to segregation likely could not be construed before 1961. The Court of Appeals for the Eighth Circuit on August 18, 1958, reversed this stay order, but delayed enforcement of its order to allow further action by the United States Supreme Court. These cases and petitions are collected at 3 Race Rel. L. Rep. 621-49.

The United States Supreme Court granted certiorari on August 28, 1958, and set hearing for September 11. On September 12, the court upheld the Court of Appeals action in overruling the district court suspension, 3 Race Rel. L. Rep. 619, and reinstated the original order requiring desegregation.

Chronology of New Developments

August 20, 1958: President Eisenhower issues statement urging all citizens to obey final court orders (p. 853).

August 20: Arkansas chancery court declares 1957 segregation acts valid (p. 978).

August 20: United States Supreme Court grants

certiorari on Court of Appeals action in refusing to allow delay in Little Rock integration and sets hearing (3 Race Rel. L. Rep. 619 [August issue]).

August 23: Arkansas Governor Orval Faubus calls special session of the Arkansas General Assembly to consider segregation measures (proclamation, p. 1037).

August 26: Arkansas Assembly convenes, hears appeal by Governor Faubus (text of address, p. 1037).

August 30: Arkansas Assembly completes action on 16 segregation measures, adjourns *sine die*.

September 8: Little Rock School Board files petition for writ of certiorari in United States Supreme Court (petition, p. 865).

September 11-12: United States Supreme Court hears Little Rock petition, affirms Court of Appeals order denying stay in integration, reinstates original desegregation decree (3 Race Rel. L. Rep. 619 [August issue]).

September 12: Governor Faubus orders Little Rock Schools closed (proclamation, p. 869).

September 12: Governor Faubus signs 15 Acts dealing with segregation (Text of Acts, pp. 1042-1059).

September 16: Governor Faubus calls special election on school closing (proclamation, p. 875).

September 17: Little Rock private school operation corporation has charter approved by Pulaski County circuit court (Charter, p. 870).

September 23: Little Rock school board asks federal district court for instructions in view of Arkansas legislative enactments (petition, p. 872).

September 24: Negro plaintiffs ask federal district court to enjoin leasing of Little Rock High School to private school group (petition, p. 875).

September 24: United States Attorney-General files a brief as *amicus curiae* (p. 877).

September 25: Federal district court refuses both the petition by the school board and the petition by Negroes (oral opinion p. 882, orders p. 887).

September 27: Special election held at Little Rock, voters approve continued segregation. (Ballot for the election appears at p. 875.)

September 29: Little Rock school board declares high school property surplus and authorizes its lease to private group (resolution, p. 887). The lease is then executed (agreement p. 889), and the private operating group announces a proposed contract for teachers (p. 891). Later, the United States Court of Appeals for the Eighth Circuit enters an order restraining the transfer of school property to the private group (p. 893).

September 29: The United States Supreme Court enters its opinion affirming Court of Appeals for the Eighth Circuit action in refusing delay in desegregation (p. 855).

October 1: President Eisenhower explains his position on school closing at press conference (partial transcript, p. 853).

October 6: U.S. Court of Appeals for the Eighth Circuit extends its temporary restraining order of September 29 (p. 893).

October 6: Mr. Justice Felix Frankfurter concurs in the Supreme Court opinion of September 29 (p. 862).

October 15: U.S. Court of Appeals for the Eighth Circuit grants a temporary injunction against leasing of Little Rock school property (p. 894).

PRESIDENT

EDUCATION

Public Schools—Arkansas

Two days after the United States Court of Appeals for the Eighth Circuit announced its decision refusing a delay in the Little Rock school desegregation case (3 Race Rel. L. Rep. 621), President Eisenhower made the following statement at the opening of his regular weekly press conference:

Because there are still some phases of this case pending in the courts, it would not be appropriate to express my view on the case itself.

This case, however, or any person's agreement or disagreement with its outcome, must not be confused with a solemn duty that all Americans have to comply with the final orders of the court. Nor should we lose sight of the fact that the maintenance of order to permit compliance with the final orders of the court is the responsibility of each state. Each state owes to its inhabitants, to its sister states and to the union the obligation to suppress unlawful forces. It cannot by action or deliberate failure to act permit violence to frustrate the preservation of individual rights as determined by court decree. It is my hope that each state will fulfill its obligation with a full realization of the gravity of any other course.

Defiance of this duty would present the most serious problem, but there can be no equivocation as to the responsibility of the federal government in such an event. My feelings are exactly as they were a year ago. As I said then:

> "The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of government will support and insure the carrying out of the decisions of the federal courts."

Every American must understand that if an individual, community or state is going successfully and continuously to defy the courts, then there is anarchy.

I continue to insist that the common sense of the individual and his feeling of civic responsibility must eventually come into play if we are to solve this problem.

On October 1, 1958, shortly after the United States Supreme Court delivered its full opinion denying a stay of desegregation at Little Rock (p. 855, *infra*), the following exchange was recorded at the President's press conference:

MERRIMAN SMITH of United Press International—Mr. President, in the light of recent rulings and decisions by the Supreme Court, the Appellate and District Courts, could you tell us, sir, what is your position on the cities in Virginia and Arkansas where the schools are closed? Do you think these public schools should be reopened immediately on an integrated basis, without their being forced into it by new moves by the Federal Government?

A.—Well now, with respect to that question—of my feelings about the closing of schools, I have already put myself on record; and I am not going now to try to detail any ideas of exactly how it would be done or how these people can move to bring their affairs in within the limits set for integration by the courts, Federal courts from the district on up.

I will read you a little statement that I prepared. There will be copies of it, if you want it, outside. It's very short, about my idea about the situation as of now.

The Supreme Court, in its opinion rendered Monday, once again has spoken with unanimity on the matter of equality of opportunity for education in the nation's public schools.

It is incumbent upon all Americans, public officials and private citizens alike, to recognize their duty of complying with the rulings of the highest court in the land.

Any other course, as I have said before, would be fraught with grave consequences to our nation.

Americans have always been proud that their institutions rest on the concept of equal justice under law. We must never forget that the rights of all of us depend upon respect for the lawfully determined rights of each of us.

As one nation, we must assure to all our people, whatever their color or creed, the enjoyment of their constitutional rights, and the full measures of the law's protection.

We must be faithful to our constitutional ideals and go forth in good faith with the unremitting task of translating them into reality.

I want to remind you that a number of these cases of different kinds are still before the courts and I am going to have nothing further to say until those judgments have been rendered.

UNITED STATES SUPREME COURT

EDUCATION
Public Schools—Arkansas

William G. COOPER, et al., etc v. John AARON et al.

United States Supreme Court, August Special Term, 1958, No. 1, 78 S.Ct. 1401, September 29, 1958.

SUMMARY: On June 21, 1958, the United States District Court at Little Rock granted a two-and-a-half year delay in the start of previously-ordered desegregation in the Little Rock high schools (3 Race Rel. L. Rep. 621). This stay was overruled by the U.S. Court of Appeals for the Eighth Circuit on August 18, 1958 (3 Race Rel. L. Rep. 621). The Little Rock school board asked certiorari in the United States Supreme Court, which was granted August 28, 1958 (3 Race Rel. L. Rep. 619). After hearing, the Supreme Court on September 12 upheld the Court of Appeals action and entered a brief order (3 Race Rel. L. Rep. 619). The subsequent opinion of the court delivered on September 29, a concurring opinion by Mr. Justice Frankfurter delivered October 7, and the school board petition for certiorari are reproduced below. (For a detailed background and chronology of the Little Rock school situation, see page 851, *supra.*)

Opinion of the Court by The CHIEF JUSTICE, Mr. Justice BLACK, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS, Mr. Justice BURTON, Mr. Justice CLARK, Mr. Justice HARLAN, Mr. Justice BRENNAN, and Mr. Justice WHITTAKER.

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in Brown v. Board of Education have been further challenged and tested in the courts. We reject these contentions.

The case was argued before us on September 11, 1958. On the following day we unanimously affirmed the judgment of the Court of Appeals for the Eighth Circuit, 257 F.2d 33, which had reversed a judgment of the District Court for the Eastern District of Arkansas, 163 F.Supp. 13. The District Court had granted the application of the petitioners, the Little Rock School Board and School Superintendent, to suspend for two and one-half years the operation of the School Board's court-approved desegregation program. In order that the School Board might know, without doubt, its duty in this regard before the opening of school, which had been set for the following Monday, September 15, 1958, we immediately issued the judgment, reserving the expression of our supporting views

to a later date.* This opinion of all of the members of the Court embodies those views.

[*Facts, Circumstances*]

The following are the facts and circumstances so far as necessary to show how the legal questions are presented.

On May 17, 1954, this Court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686. The Court postponed, pending further argument, formulation of a decree to effectuate this decision. That decree was rendered May 31, 1955. Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 756. In the formulation of that decree the Court recognized that good faith compliance with the principles declared in Brown might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." The Court went on to state:

> "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at pages 300-301, 75 S.Ct. at page 756.

["*Prompt, Reasonable Start*"]

Under such circumstances, the District Courts were directed to require "a prompt and reasonable start toward full compliance," and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed." Ibid. Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the Court should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could

* The following was the Court's *per curiam* opinion, 78 S.Ct. 1399:

> The Court, having fully deliberated upon the oral arguments had on August 28, 1958, as supplemented by the arguments presented on September 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of August 18, 1958, must be affirmed. In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas, we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.
>
> It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.
>
> The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas.

not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

[*Board's Statement*]

On May 20, 1954, three days after the first Brown opinion, the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled "Supreme Court Decision—Segregation in Public Schools." In this statement the Board recognized that

> "It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed."

Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It instructed the Superintendent of Schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, seven days before the second Brown opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. Following the adoption of this plan, the Superintendent of Schools discussed it with a large number of citizen groups in the city. As a result of these discussions, the Board reached the conclusion that "a large majority of the residents" of Little Rock were of "the belief * * that the Plan, although objectionable in principle," from the point of view of those supporting segregated schools, "was still the best for the interests of all pupils in the District."

Upon challenge by a group of Negro plaintiffs desiring more rapid completion of the desegregation process, the District Court upheld the School Board's plan, Aaron v. Cooper, 143 F.Supp. 855. The Court of Appeals affirmed, 8 Cir., 243 F.2d 361. Review of that judgment was not sought here.

[*Role of State Authorities*]

While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose "in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court," Ark.Const. Amend. 44, and, through the initiative, a pupil assignment law, Ark.Stats. §§ 80-1519 to 80-1524. Pursuant to the constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark.Stats. § 80-1525, and a law establishing a State Sovereignty Commission, Ark.Stats. §§ 6-801 to 6-824, were enacted by the General Assembly in February 1957.

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

[*Guard Units Dispatched*]

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds, and placed the school "off limits" to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded. The findings were these:

> "Up to this time [September 2], no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out

of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." Aaron v. Cooper, 156 F.Supp. 220, 225.

The Board's petition for postponement in this proceeding states: "The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe that there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School] District has become more bitter and unrestrained." The Governor's action caused the School Board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students * * * from entering," as they continued to do every school day during the following three weeks. 156 F.Supp. at page 225.

[*U.S. Attorney's Investigation*]

That same day, September 4, 1957, the United States Attorney for the Eastern District of Arkansas was requested by the District Court to begin an immediate investigation in order to fix responsibility for the interference with the orderly implementation of the District Court's direction to carry out the desegregation program. Three days later, September 7, the District Court denied a petition of the School Board and the Superintendent of Schools for an order temporarily suspending continuance of the program.

Upon completion of the United States Attorney's investigation, he and the Attorney General of the United States, at the District Court's request, entered the proceedings and filed a petition on behalf of the United States, as *amicus curiae*, to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court's order. After hearings on the petition, the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September 20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. 156 F.Supp. 220, affirmed, Faubus v. United States, 8 Cir., 254 F.2d 797. The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high

school. 163 F.Supp. at page 16. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

[*District Court Relief*]

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of "chaos, bedlam and turmoil"; that there were "repeated incidents of more or less serious violence directed against the Negro students and their property"; that there was "tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program"; that a school official was threatened with violence; that a "serious financial burden" had been cast on the School District; that the education of the students had suffered "and under existing conditions will continue to suffer"; that the Board would continue to need "military assistance or its equivalent"; that the local police department would not be able "to detail enough men to afford the necessary protection"; and that the situation was "intolerable." 163 F.Supp., at pages 20-25.

The District Court's judgment was dated June 20, 1958. The Negro respondents appealed to the Court of Appeals for the Eighth Circuit and also sought there a stay of the District Court's judgment. At the same time they filed a petition for certiorari in this Court asking us to review the District Court's judgment without awaiting the disposition of their appeal to the Court of Appeals, or of their petition to that court for a stay. That we declined to do. 357 U.S. 566, 78 S.Ct. 1189, 2 L.Ed.2d 1544. The Court of Appeals did not act on the petition for a stay but on August 18, 1958, after convening in special session on August 4 and hearing the appeal, reversed the District Court, 257 F.2d 33. On August 21, 1958, the Court of Appeals stayed its mandate to permit the School Board to petition this Court for certiorari. Pending the filing of the School Board's petition for certiorari, the Negro respondents, on August 23, 1958, applied to Mr. Justice Whittaker, as Circuit Justice for the Eighth Circuit, to stay the order of the Court of Appeals withholding its own mandate and also to stay the District Court's judgment. In view of the nature of the motions, he referred them to the entire Court. Recognizing the vital importance of a decision of the issues in time to permit arrangements to be made for the 1958-1959 school year, see Aaron v. Cooper, 357 U.S. 566, 567, 78 S.Ct. 1189, 1190, we convened in Special Term on August 28, 1958, and heard oral argument on the respondent's motions, and also argument of the Solicitor General who, by invitation, appeared for the United States as *amicus curiae*, and asserted that the Court of Appeals' judgment was clearly correct on the merits, and urged that we vacate its stay forthwith. Finding that respondents' application necessarily involved consideration of the merits of the litigation, we entered an order which deferred decision upon the motions pending the disposition of the School Board's petition for certiorari, and fixed September 8, 1958, as the day on or before which such petition might be filed, and September 11, 1958, for oral argument upon the petition. The petition for certiorari, duly filed, was granted in open Court on September 11, 1958, ——U.S.——, 78 S.Ct. 1398, and further arguments were had, the Solicitor General again urging the correctness of the judgment of the Court of Appeals. On September 12, 1958, as

already mentioned we unanimously affirmed the judgment of the Court of Appeals in the *per curiam* opinion set forth in the margin at the outset of this opinion.

[*Good Faith Accepted*]

In affirming the judgment of the Court of Appeals which reversed the District Court we have accepted without reservation the position of the School Board, the Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted the findings of the District Court as to the conditions at Central High School during the 1957-1958 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the Brown case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: "The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."

[*Sympathize With Board*]

One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." Buchanan v. Warley, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

[*Legal Principles Plain*]

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with

the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." Ex parte Virginia, 100 U.S. 339, 347, 25 L.Ed. 676. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667; Com. of Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792; Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; or whatever the guise in which it is taken, see Derrington v. Plummer, 5 Cir., 240 F.2d 922; Department of Conservation and Development v. Tate, 4 Cir., 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." Smith v. Texas, 311 U.S. 128, 132, 61 S.Ct. 164, 166, 85 L.Ed. 84.

[*Role of* Brown *Case*]

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶ 3 "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. * * *" Ableman v. Booth, 21 How. 506, 524, 16 L.Ed. 169.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *." United States v. Peters, 5 Cranch 115, 136, 3 L.Ed. 53. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases * * *." Sterling v. Constantin, 287 U.S. 378, 397-398, 53 S.Ct. 190, 195, 77 L.Ed. 375.

[*Concern of States*]

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools

so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884. The basic decision in Brown was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

* * *

Concurring Opinion

Frankfurter, Justice

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake.

By working together by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences.

This process was under way in Little Rock. The detailed plan formulated by the Little Rock School Board in the light of local circumstances, had been approved by the United States District Court in Arkansas as satisfying the requirements of this Court's decree in Brown v. Board of Education, 349 U.S. 294. The Little Rock School Board had embarked on an educational effort "to obtain public acceptance of its plan." Thus the process of the community's accommodation to new demands of law upon it, the development of habits of acceptance of the right of colored children to the equal protection of the laws guaranteed by the Constitution had peacefully and promisingly begun.

The condition in Little Rock before this process was forcibly impeded by those in control of the Government of Arkansas was thus described by the District Court, and these findings of fact have not been controverted:

"14. Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the mayor and chief of police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the nine colored students at Central High School. The mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The mayor, the chief of police, and the school authorities made no request to the governor or any representative of his for state assistance in maintaining peace and order at Central High School.

"Neither the governor nor any other official of the state government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for state assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." (156 F.2d 220, 225.)

All this was disrupted by the introduction of the state militia and by other obstructive measures taken by the state. The illegality of these interferences with the constitutional right of Negro children qualified to enter the Central High School is unaffected by whatever action or non-action the Federal Government had seen fit to take. Nor is it neutralized by the undoubted good faith of the Little Rock School Board in endeavoring to discharge its constitutional duty.

[*Force a Last Resort*]

The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our nation. But the tragic aspect of this disruptive tactic was that the power of the state was used not to sustain law but as an instrument for thwarting law.

The state of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully

carrying out the board's and the state's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the state, it is legally and morally before the court.

We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the Board of Education had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience.

No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the nation, North and South, when law was forcibly resisted or systematically evaded, it has signaled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a state has moral superiority over the law of the constitution.

["*State . . . Must Yield*"]

For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The state "must * * * yield to an authority that is paramount to the state." This language of command to a state is Mr. Justice Holmes's, speaking for the court that comprised Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Brandeis, Mr. Justice Sutherland, Mr. Justice Butler, Mr. Justice Stone. (Wisconsin v. Illinois, 281 U.S. 179, 197.)

When defiance of law, judicially pronounced, was last sought to be justified before this court, views were expressed which are now especially relevant.

> "The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the republic. 'A government of laws and not men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power.
>
> "Every act of government may be challenged by an appeal to law, as finally pronounced by this court. Even this court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.
>
> "But from their own experience and their deep reading in history, the founders knew that law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.' (Pound, The Future of Law [1937], 47 Yale L. J., I, 13.) The conception of a government by laws dominated the thoughts of those who founded this nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judged in his own case. That is what courts are for." (United States v. United Mine Workers, 330 U.S. 258, 307-309.)

[*Approval Not Required*]

The duty to abstain from resistance to "the supreme law of the land," U.S. Const., Art. VI, Section 2, as declared by the organ of our government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme law of the land." (See President Andrew Jackson's Message to Congress of Jan. 16, 1833, 2 Richardson, Messages and Papers of the Presidents, 610, 623.)

Particularly is this so where the declaration of what "the supreme law" commands on an underlying moral issue is not the dubious pronouncement of a gravely divided court but is the unanimous conclusion of a long-matured deliberative process. The Constitution is not the formulation of the merely personal views of the members of this court, nor can its authority be reduced to the claim that state officials are its controlling interpreters. Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.

The process of ending unconstitutional exclusion of pupils from the common school system—"common" meaning shared alike—solely because of color is no doubt not an easy, overnight task in a few states where a drastic alteration in the ways of communities is involved.

Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose—violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim—nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the constitution confirms.

For carrying out the decision that color alone cannot bar a child from a public school, this court has recognized the diversity of circumstances in local school situations.

But is it a reasonable hope that the necessary endeavors for such adjustment will be furthered, that racial frictions will be ameliorated, by a reversal of the process and interrupting effective measures toward the necessary goal? The progress that has been made in respecting the constitutional rights of the Negro children, according to the graduated plan sanctioned by the two lower courts, would have to be retraced, perhaps with even greater difficulty because of deference to forcible resistance. It would have to be retraced against the seemingly vindicated feeling of those who actively sought to block that progress.

Is there not the strongest reason for concluding that to accede to the board's request, on the basis of the circumstances that gave rise to it, for a suspension of the board's non-segregation plan, would be but the beginning of a series of delays calculated to nullify this court's adamant decisions in the Brown case that the Constitution precludes compulsory segregation based on color in state-supported schools?

[*Official Responsibility*]

That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with a Negro population of large proportion. Compliance with decisions of this court, as the constitutional organ of the supreme law of the land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

Lincoln's appeal to "the better angels of our nature" failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's first and second inaugurals bequeathed to the union, cemented with blood, a moral heritage which,

when drawn upon in times of stress and strife, is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.

* * *

School Board Petition for Certiorari

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on Aug. 18, 1958.

The opinion of the Court of Appeals is as yet unreported; it and the district court opinion are abstracted in the appendix to respondents' brief filed prior to the Aug. 28 hearing.

[*Jurisdiction*]

The judgment of the Court of Appeals was entered Aug. 18, 1958. On Aug. 28, 1958, by order of this court, the petitioners were given leave to file petition for a writ of certiorari not later than Sept. 8, 1958. The jurisdiction of this court rests on 28 U. S. C., Art. 1256 (1).

The District Court found that the school board's plan of desegregation has resulted in severe impairment of the educational program and an over-all intolerable situation because of overt resistance and opposition by the state government, students, parents, organized groups and segments of the community.

[*Questions Presented*]

The questions presented are:

1. Whether a court of equity may postpone the enforcement of the respondents' constitutional rights if the continued enforcement thereof will result in an intolerable situation and great disruption of the educational process to the detriment of the public interest, the schools, and the students including the respondents.

2. Whether a school district has a duty and obligation, by invoking extraordinary legal processes and otherwise, to quell violence, disorder and organized resistance to desegregation.

CONSTITUTIONAL AMENDMENT INVOLVED

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Little Rock School District, hereinafter referred to as "the district," after the first Brown decision and before the second Brown decision, evolved a plan of integration. The good faith of the district has never been challenged. The plan contemplated integration in the senior high schools of the district during the 1957-1958 term, later in the junior high schools, and still later in the grade schools. It was assumed that within a period of seven years integration would be complete.

The N.A.A.C.P. was not satisfied with the plan or the time scheduled and caused a suit to be filed contending that complete integration should be required overnight. The District Court and the Circuit Court of Appeals approved the seven-year plan. See Aaron v. Cooper, 143 F.Supp. 855 (E.D. Ark.); 243 F.2d 361 (C.C.A. 8th).

The district commenced functioning under the plan in September, 1957, and it operated during the 1957-1958 term with disastrous results. With an experience which taught the futility of compliance without sacrificing those values uppermost in the minds of educators, the district filed a petition asking that the District Court, in the exercise of its discretion, postpone operations under the plan for a period of two-and-one-half years. On undisputed testimony as to what had happened, the District Court concluded that the education of all pupils was being harmed and in the public interest an interruption in the desegregation plan should be permitted.

DISTRICT COURT'S FINDINGS

The District Court expressly found, among other things, destruction; that tension and violence occurred among students leading to more than 100 suspensions and expulsions . . .; that the

community and the press have condemned the principle of integration, abused the school officials and Federal authority, and announced that integration could be avoided; that teachers and school officials were exhausted, tense, frustrated, and apprehensive in the face of threats; that actual enforcement processes were inadequate to cope with the situation and troops or the equivalent would be necessary again; that education has suffered and will continue to suffer; that there was chaos, bedlam and turmoil from the beginning; that the situation is intolerable.

In addition to these findings, other factors are revealed in the record. Many of the mob participants were identifiable but none were charged by Federal law enforcement agencies. The pupils who became involved in disciplinary investigations were being guided by adults. The F.B.I. made a full report of the situation; the Department of Justice has not seen fit to make this report available to the school board. Nor was the report utilized by the Department of Justice since it publicly dropped plans to prosecute agitators. The legislative, executive, and judicial departments of the State Government opposed the desegregation of Little Rock Schools enacting laws, calling out troops, making statements villifying Federal law and Federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.

On the basis of its findings, the District Court held that the request for a postponement was made in good faith and was manifestly justifiable; that severe impairment of the educational program and of the welfare of the students and the community would result were the postponement not granted; that the inherent powers of equity and the spirit of the second Brown decision dictated that the school district be allowed to operate its schools on a segregated basis for a time without being considered in contempt of court.

The Circuit Court of Appeals for the Eighth Circuit agreed with the findings of the District Court that the evidence is appalling but that great additional expense, disruption of normal educational procedures, tension and nervous collapse of the school personnel, turmoil, bedlam, and chaos, are not a legal basis for suspension of the plan since this would be an accession to the demands of insurrectionists.

REASONS FOR GRANTING THE WRIT

The tremendous importance of the questions presented by this case is manifest. To this point little can be stated that would not be merely cumulative to the arguments expressed in the petition for writ of certiorari previously made, the application to vacate the stay granted by the Circuit Court of Appeals, the response to that application, the oral argument directed to the application to vacate, the briefs filed by amici curiae, and the certified record heretofore lodged with the court.

This case calls for a decision more far reaching, studied and comprehensive than the superficial treatment accorded the matter in the Circuit Court of Appeals. Negro children claim that their right to attend unsegregated schools is violated by the District Court judgment. But no one contends that the Little Rock School District has denied to the children their constitutional rights under the Brown decision. Rather, the action offensive to the Fourteenth Amendment to the Constitution of the United States is mass opposition to integration by the people of the state and obstruction by the state itself.

Whatever the answer may be, it certainly is not to simply return the school district to the bedlam, turmoil and chaos which has been destroying the school district and has emasculated the educational program.

The argument of petitioner is reflected by the questions presented. First, where a school board has made a prompt start toward desegregation and has continued throughout to exercise good faith, severe impairment of the educational system both present and prospective because of desegregation entitles the school district to a postponement regardless of the source and motivation of the destructive forces. The second Brown decision was so construed by the District Court.

If the Brown rule is not sufficiently flexible to allow time for the subsidence of forces such as are arrayed here against it, then it may be seriously doubted whether courts are able to effectively cope with "state action" such as this, and perhaps this court should so hold. Certainly the legislative and political departments of the United States Government have displayed little willingness to assist in the implementation of the Brown decisions, although the matter would seem to rest more appropriately in those depart-

ments where obstruction by the Governor and Legislature and mass opposition by the people of a state is concerned.

Even though this is an area which courts have often shunned for lack of practical power to act, the Circuit Court of Appeals has suggested that the duty of resisting the concerted opposition of the state and its populace lies with the school district. Certainly the responsibilities of defendant school districts should be clarified and delineated by this court.

And finally, denial of relief to the school district will have a profound effect over the nation. There are thousands of school districts that have not made a step toward desegregation. In their repose these districts are conducting educational programs without harassment of any sort albeit constitutional rights declared by the Brown decisions are being violated. Thus it would be the height of irony if the Little Rock School District, having made the start in good faith, were denied this postponement at the expense of the entire educational program at the high school level. The attorneys for the respondents have, at every stage, tacitly conceded the existence of the situation as found by the District Court, but have ignored and skirted the equities of the school district and of the thousands of students, parents and teachers. Affirmance of the Circuit Court of Appeals, or denial of this petition for writ of certiorari, would discourage any further voluntary compliance by school districts with the Brown decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

MISCELLANEOUS ORDERS

The United States Supreme Court:

Affirmed on appeal in the following cases:

New Orleans City Park Improvement Association v. Mandeville Detiege, et al. (Prior decision 252 F.2d 122, 3 Race Rel. L. Rep. 217 [5th Cir. 1958] affirming district court action declaring unconstitutional a Louisiana law denying Negroes admission to certain parks). No. 295, October 20, 1958, 79 S.Ct. 99. Another decision: 2 Race Rel. L. Rep. 994.

Board of Supervisors of Louisiana State University & Agricultural & Mechanical College et al. v. Arnease Ludley, et al. (Prior decision 252 F.2d 372, 3 Race Rel. L. Rep. 209 [5th Cir. 1958] affirming a district court ruling that the Lousiana statute requiring a certificate of good moral character to be furnished by local and parish school officials as a prerequisite to admission to public colleges or universities is unconstitutional). No. 114, October 13, 1958: 79 S.Ct. 31. Other decisions: 2 Race Rel. L. Rep. 378, 600.

Shuttlesworth v. Birmingham Board of Education (Prior decision 162 F.Supp. 372, 3 Race Rel. L. Rep. 413 [U.S. District Court, Northern District, Alabama, 1958], refusing to declare unconstitutional the Alabama Placement Act). No. 341, November 20, 1958, 27 L.W. 3160, order: "PER CURIAM: The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the district court rested its decision."

Probable jurisdiction on appeal noted:

Harrison, Attorney General of Virginia, et al. v. National Association for the Advancement of Colored People. (Prior decision 159 F.Supp. 503, 3 Race Rel. L. Rep. 274, 1958 [sub nom *NAACP* v *Patty*] holding unconstitutional the application of Virginia Acts punishing barratry and requiring registration to the normal activities of the NAACP). No 127, October 13, 1958, 79 S.Ct. 33.

Petition for rehearing denied:

Pennsylvania v. Board of Directors of City Trusts of Philadelphia (Prior decision 78 S.Ct. 1383, 3 Race Rel. L. Rep. 424, in which the United States Supreme Court denied an appeal, treating it as a writ of certiorari, upholding the Supreme Court of Pennsylvania action approving the substitution of a private trustee to effectuate the testator's purpose of furnishing education for "poor white male orphans"). No. 947 October 13, 1958, 79 S.Ct. 14. Other decisions: 1 Race Rel. L. Rep. 325, 340; 2 Race Rel. L. Rep. 68, 591, 811, 992; 3 Race Rel. L. Rep. 188.

Denied certiorari (i.e., declined to review):

Bailey v. State of Arkansas (Prior decision 313 S.W.2d 388, 3 Race Rel. L. Rep. 758 [Ark. Supreme Court, 1958], in which the conviction of a Negro on rape charge was affirmed). No. 189, October 20, 1958, 79 S.Ct. 101. Order: "Petition for writ of certiorari to the Supreme Court of Arkansas denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court."

Faubus et al. v United States of America, et al. (Prior decision 254 F.2d 797, 3 Race Rel. L. Rep. 439, affirming a U.S. District Court order restraining state officials from obstructing or preventing attendance by Negro pupils at the Little Rock high school). No. 212, October 13, 1958, 79 S.Ct. 49. Another decision: 2 Race Rel. L. Rep. 944 (1957).

State of Florida ex rel. Thomas v. Culver (Prior decisions 253 F.2d 507, 3 Race Rel. L. Rep. 549 [5th Cir. 1958] affirming a denial by district court of writ of *habeas corpus*, the petition being based on a allegation that acting under Florida statute, juries have systematically refused to recommend mercy toward Negroes convicted of rape while such recommendations are common when the defendant is white). No. 148, 27 L.W. 3112. Another decision: 2 Race Rel. L. Rep. 657, 778.

Judgment vacated:

National Association for the Advancement of Colored People, Inc., et al. v. Committee on Offenses Against the Administration of Justice. (Prior Decision, 101 S.E.2d 631, 3 Race Rel. L. Rep. 260, in which the Virginia Supreme Court of Appeals affirmed the constitutionality of a statute allowing trial courts to subpoena membership records of organizations). No. 84, October 13, 1958, 79 S.Ct. 24, the court entered the following order: "PER CURIAM. The petition for writ of certiorari is granted. In view of the representation of the Attorney General of Virginia that the cause has become moot, the judgment of the Supreme Court of Appeals of Virginia is so vacated and the cause is remanded for such other further proceedings as that court may deem appropriate."

EDUCATION

Public Schools—Arkansas (Little Rock)

For a detailed summary and chronology of the following developments and all others in the Little Rock School situation, see page 851, *supra.*

Governor's School-Closing Proclamation

On the same day the United States Supreme Court issued its order denying a stay in desegregation at the Little Rock High School, September 12, 1958, Arkansas Governor Orval Faubus issued a proclamation closing the high schools in that city. This action was taken under authority of Act No. 4 of the 1958 Extraordinary session of the 1958 Arkansas legislature (p. 1048, *infra.*)

To all to whom these presents shall come, Greetings:

Whereas, Act No. 4 of the Acts of the Second Extraordinary Session of the Sixty-first General Assembly, approved Sept. 12, 1958, provides that the Governor: (A) order any or all schools of a school district to be closed immediately; and (B) call a special election within thirty days thereafter at which special election all qualified electors of the school district shall have an opportunity to vote for or against the proposition of racial integration of all schools within the school district, whenever the Governor shall determine that such action is necessary in order to maintain the peace against actual or impending domestic violence in the school district, or shall determine that a general, suitable and efficient educational system cannot be maintained in any school district because of integration of the races in any school of the district; and,

Whereas, the Little Rock School Board has fixed Monday, Sept. 15, 1958, as the date for convening of classes in the senior high schools of said district and has been ordered by a Federal court to operate same on a racially-integrated basis; and,

Whereas, I have determined that domestic violence within Little Rock School District is impending, and that a general, suitable, and efficient educational system cannot be maintained in the senior high schools of the Little Rock School District because of integration of the races in such schools;

Now, therefore, I, Orval E. Faubus, Governor of the State of Arkansas, acting under the applicable provisions of the aforementioned Act No. 4 of the Acts of the Second Extraordinary Session of the Sixty-first General Assembly, approved Sept. 12, 1958, do hereby order by public proclamation that:

(A) The public senior high schools of the Little Rock School District are hereby ordered closed persuant to said Act, effective at 8 o'clock A. M., Monday, Sept. 15, 1958.

(B) That a special election be held in the Little Rock School District on Tuesday, Oct. 7, 1958, in the manner provided by law and said Act No. 4.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed. Done in office on this twelfth day of September, 1958.

s/Orval E. Faubus,
Governor
C. G. (Crip) Hall,
Sec. of State

Private School Charter

Five days later, on September 17, a group of Little Rock citizens filed with Pulaski County circuit court a proposed charter for a corporation "to establish, conduct and maintain private schools of the highest educational standards . . . where students may obtain an education comparable to that obtainable in the Class A public schools . . . with particular reference to fitting and preparing said students mentally, morally and physically for higher education . . ." The charter, as approved by the court the same day, is reproduced below:

ARTICLES OF ASSOCIATION

I.

Names, Places of Business, Objects and Powers

Section (a). The name of this corporation shall be:

THE LITTLE ROCK PRIVATE SCHOOL CORPORATION

Section (b). The principal office and place of business of The Little Rock Private School Corporation shall be in the City of Little Rock, Pulaski County, State of Arkansas.

Section (c). The Little Rock Private School Corporation is a non-profit association, and shall be operated for the following purposes:

(1) To establish, conduct and maintain private schools of the highest educational standards in the City of Little Rock, County of Pulaski, State of Arkansas, where students may obtain an education comparable to that obtainable in the Class A public schools of this state, including the extra-curricular activities normally enjoyed by students in other schools, with particular reference to fitting and preparing said students mentally, morally, and physically for higher education in colleges and universities.

Section (d). The Little Rock Private School Corporation shall have the following specific powers, to-wit:

(1) To acquire by donation, purchase, lease or otherwise, real estate and interests therein, together with such buildings, fixtures and equipment as may be necessary or desirable, and to improve and maintain the same.

(2) To accept gifts, grants, donations, legacies and endowments in furtherance of its objectives.

(3) To charge and collect from each student a monthly fee or tuition as deemed necessary and expedient by its members.

(4) To borrow money, and to issue its bonds, notes, or other evidences of debt therefor, and to secure the payment of the same by mortgage or lien upon its real estate or other property as provided by law; and

(5) To do all and everything lawful and proper which may be necessary or expedient for the accomplishment of any of the purposes or the attainment of any of the objects herein set forth.

II.

Membership

Section (a). The members of the Little Rock Private School Corporation shall be those persons who have affixed their signatures to these Articles of Association and their respective successors who shall be selected as hereinafter provided.

Section (b). Any member may resign by filing a written resignation with the Secretary.

Section (c). In the event any member shall die, resign, or become unable for any reason to serve as such, his or her successor shall be elected at the meeting next following the event creating such vacancy.

Section (d). Each member shall be entitled to one vote on each matter submitted to a vote of the members.

Section (e). A majority of the members present at any meeting shall constitute a quorum, and the act of a majority where there is a quorum shall be binding as the act of the membership.

Section (f). The membership at its first meeting shall select from its members a President, a Vice-President, a Secretary, and a Treasurer.

Section (g). The membership shall have the power to employ administrators, teachers, clerks, attorneys, agents, servants, and other personnel deemed necessary by them, and to dismiss them

at its discretion; to fix their compensation and prescribe their duties; and to require security therefrom as it may deem expedient or proper.

III.
Meetings of Members

Section (a). The first meeting of the members shall be held in Room 206, Arkansas Educational Association Building, Little Rock, Arkansas, on September 18, 1958, at 10:00 A.M. Thereafter, meetings of the members may be called by the President or by not less than one-third of the members.

Section (b). The membership may designate any place within the City of Little Rock, Arkansas, as its place of meeting, and notice of time and place of any meeting may be given to the membership in writing or orally.

IV.
Officers

Section (a). The officers of the corporation shall be elected by the membership on the 1st day of each fiscal year of the corporation. Each officer shall hold office until his successor shall have been duly elected and shall have qualified.

Section (b). Any officer elected by the membership may be removed by the membership whenever in its judgment the best interests of the corporation would be served thereby.

Section (c). A vacancy in any office because of death, resignation, removal, disqualification or otherwise, may be filled by the membership for the unexpired portion of the term.

Section (d). The President shall be the principal executive officer of the corporation, and shall in general supervise and control all of the business and affairs of the corporation. He shall preside at all meetings of the membership. He may sign, with the Secretary or any other proper officer of the corporation authorized by the membership, any deeds, mortgages, contracts or other instruments which the membership has authorized to be executed, and in general he shall perform all duties incident to the office of President, and such other duties as may be prescribed by the membership from time to time.

Section (e). In the absence of the President or in the event of his inability or refusal to act, the Vice-President shall perform the duties of the President, and when so acting, shall have all the powers of and be subject to all the restrictions upon the President. The Vice-President shall perform such other duties as from time to time may be assigned to him by the President or by the membership.

Section (f). The secretary shall keep the minutes of the meetings of the members in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these Articles of Association; and in general, perform all duties incident to the office of Secretary and such other duties as from time to time may be assigned to him by the President or by the membership.

Section (g). The Treasurer shall have charge and custody of and be responsible for all funds and securities of the corporation; receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all moneys in the name of the corporation in such banks or other depositories as shall be selected by the membership; and in general, perform all the duties incident to the office of Treasurer, and such other duties as from time to time may be assigned to him by the President or by the membership. If required by the membership, the Treasurer shall give a bond for the faithful discharge of his duties in such sum and with such surety as the membership shall determine.

V.
Unexpended Funds

Section (a). Any and all funds accruing to The Little Rock Private Schools Corporation which remain unexpended and uncommitted at the end of any fiscal year shall be placed in reserve for use during the next succeeding fiscal year.

VI.

Section (a). The first fiscal year of the corporation shall begin on the date of the first meeting of the corporation as herein provided, and end on the following June 30th, and thereafter the fiscal year shall begin on July 1st and end on the following June 30th of such succeeding year.

VII.
Seal

Section (a). The membership shall provide a corporate seal which shall be in the form of a circle, and shall have inscribed thereon the name of the corporation and year of its organization. Said seal may be used as is customary for necessary purposes.

VIII.
Amendment of Articles of Association

Section (a). These Articles of Association may be amended or rescinded in whole or in part by the vote of a majority of the members present at any duly convened meeting.

IX.
Period of Existence

Section (a). The period for which this corporation shall exist, unless at an earlier date voluntarily dissolved through proper corporate action, shall be perpetual.

X.
Agent for Service

Section (a). The name and address of the resident Agent for Service of this corporation shall be Leon B. Catlett, 727 Pyramid Life Building, Little Rock, Arkansas.

XI.
Miscellaneous

Section (a). The powers herein expressly set forth shall not be in diminution or limitation of the general powers granted to or acquired by the corporation under the provisions of Act No. 51 of the Acts of the General Assembly, approved February 3, 1875, but are in addition thereto.

In Testimony Whereof, we have hereunto set our hands on this, the 17th day of September, 1958.

/s/ Dr. T. J. Raney
/s/ Mrs. Gordon P. (Willie) Oates
/s/ Ben C. Isgrig, Jr.
/s/ J. C. Mitchell
/s/ Dr. Malcolm G. Taylor
/s/ Hershel Goodman

CERTIFICATE

STATE OF ARKANSAS)
COUNTY OF PULASKI)

Be it remembered that on this 17th day of September, 1958, personally came before me, the undersigned, a Notary Public within and for the State and County aforesaid, Ben C. Isgrig, Dr. Malcolm G. Taylor, Dr. T. J. Raney, Hershel Goodman, Mrs. Gordon P. (Willie) Oates, and J. C. Mitchell, parties to the foregoing Articles of Association, each known to me personally to be such, and severally acknowledged the same to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office on the day and year aforesaid.

/s/ Kathleen M. Dollins
Notary Public

My com. expires 10-1-58

* * *

School Board Petition for Further Relief

John AARON, et al. v. William G. COOPER, et al.

United States District Court, Eastern District of Arkansas, Western Division, Civil No. 3113.

On September 23, 1958, the Little Rock School Board filed a petition in federal district court asking for instruction as to the legality of a proposed plan to lease the closed Little Rock school properties to private corporations for educational purposes.

PETITION FOR INSTRUCTIONS

1. Petitioners William G. Cooper, Harold Engstrom, Wayne Upton, Dale Alford and R. A. Lile are the duly elected and acting Directors of Little Rock School District. Virgil T. Blossom is the duly qualified and acting Superintendent of Little Rock School District; and Little Rock School District, hereafter referred to as "District," is a governmental agency created and acting under the laws of Arkansas.

2. The General Assembly of the State of Arkansas, in special session convened on August 26, 1958, enacted Acts 4 and 5 of 1958 which were signed by the Governor of Arkansas on September 12, 1958, and on that date became laws of the State of Arkansas. Copies of said bills are attached, made a part hereof, and marked, respectively, Exhibits "A" and "B".

3. Pursuant to the provisions of said Senate Bill 2, the Governor of the State of Arkansas

filed proclamations closing all of the high schools operated by the District and calling for an election to be held on September 27, 1958. Copies of said proclamations are attached, made a part hereof, and marked Exhibits "C", "D", and "E".

4. By the provisions of said Act 4 of 1958, the said high schools shall be operated on an integrated basis if "a majority of the qualified electors of the District vote in favor of the racial integration of all schools in the District;" otherwise "no school within the District shall be integrated."

5. By a telecast on September 18, 1958, the Governor of the State of Arkansas announced his plans for operating the high schools if a majority of the qualified electors of the District do not vote in favor of the racial integration of all schools within Little Rock School District. In substance, he stated:

"The Federal Government has no authority to require any State to operate public schools.

"The Federal Government has no authority to tell a State Government for what purposes it may levy taxes and how the tax money may be expended.

"In all cases involving the public schools and integration, the Federal Courts have said only that an agency of the State cannot maintain segregated schools. This ruling does not apply in any way to private schools. Private schools are not affected by these decisions, even though the schools receive aid from State and Federal sources.

"In 1875 the General Assembly enacted two laws which give us a legal way to maintain a private system of education at a time when a part of our public educational system cannot be maintained in a suitable and efficient manner.

"Our own educational people have testified that a suitable educational system at Little Rock cannot be maintained on an integrated basis. Why then should we even attempt to keep those schools open as public schools when, based upon this sworn testimony, they clearly do not meet our constitutional provisions for a suitable and efficient system of education? We have a perfect right to close these schools as public institutions and once closed and found to be not needed for public school purposes, the school board has the right and the authority under a law that has been on our statute books for 83 years, to lease these buildings and facilities to a bona fide private agency.

"A bona fide private school system appears to be the only answer to the federal government's order to integrate at any price.

"Let me read this law enacted by the General Assembly and signed by the Governor in 1875.

(Here follows a quotation of Section 80-518, Arkansas Statutes, 1947).

"Now, it is crystal-clear that if the voters of the Little Rock School District vote against integration on September 27th, these facilities will become surplus and not needed for public school purposes.

"This will leave the School Board free to lease the buildings to a suitable private agency. In this connection I am sure that you are already aware that such an agency has been organized under another law that was enacted in 1875.

"I have been informed by its organizers that they have formed this private, bona fide, non-profit corporation for the purpose of being prepared to accept any offer that may be made by the Little Rock School Board to lease its unused high school facilities for private school purposes—if the vote is against integration on September 27th.

"In this connection, here is a letter I received from the School Board:

" 'Little Rock, Arkansas
September 12, 1958

'Hon. Orval E. Faubus
Governor of Arkansas
Little Rock, Arkansas

'Dear Governor Faubus:

'It has come to our attention that you have stated as follows:

"Central High School can be operated on a private basis as a segregated school if the School Board wants to take such action."

'We are unaware that such is possible, but if this be true, we would like very much to have an opportunity for our attorneys to explore this possibility with your attorneys.

'We are as anxious as anyone for our educational program to continue unin-

terruptedly and stand ready to explore every conceivable avenue with you.

Very truly yours

LITTLE ROCK SCHOOL BOARD
By (signed) Wayne Upton,
President.'

"I accept this letter as having been written in good faith, and I call upon the Board to demonstrate their good faith by immediately offering to a private group these unoccupied school buildings after the election. I say immediately after the election because I have no doubt that the people of this school district will never voluntarily integrate their schools. I am confident that the vote on September 27th will be against integration. I say a private group, because I understand that others may be formed."

6. If, at the election to be held on September 27, 1958, a majority of the qualified electors of the District does not vote in favor of the racial integration of all schools within the boundaries of the District, no school within the District shall be opened on an integrated basis. Private institutions will then attempt to lease the high school properties belonging to the District for operation of a high school program on a segregated basis. If leases are consummated with such private organizations, they will then, upon accreditation of the schools, be entitled to state financing under the terms of Act 5 of 1958.

7. Petitioners are willing to lease said high school properties to said private institutions upon reasonable terms if in doing so they will not subject themselves to charges of contempt for having violated a directive order of this Court.

8. Petitioners ask for an immediate ruling as to whether they may without violating the orders of this Court lease said school properties to private institutions for conducting a high school program on a racially segregated basis. A ruling is requested now for if it is proper for Petitioners to lease said school properties, it is necessary that negotiations for such leases be commenced and commitments made immediately, so that there will be a minimum of delay in reopening high schools within the District in the event of a vote against racial integration of all schools within the boundaries of the District.

WHEREFORE, Petitioners ask that this Court at this time instruct them as to whether, under the existing conditions, they would violate any order of this Court in leasing to private institutions the school properties on which the District has heretofore conducted high schools.

Richard C. Butler
A. F. House
John H. Haley
Attorneys for Petitioners

* * *

Exhibit "A"

[*Exhibit "A" of the board's petition constists of the text of Act 4 of the 1958 extraordinary session of the Arkansas General Assembly. See page 1048,* infra.]

* * *

Exhibit "B"

[*Exhibit "B" of the board's petition consists of the text of Act 5 of the same session. See p. 1043,* infra.]

* * *

Exhibit "C"

[*Exhibit "C" of the board's petition consists of the text of the Governor's proclamation of September 12, 1958, closing the schools and ordering an election. See p. 869,* supra.]

* * *

Exhibit "D"

PROCLAMATION

To all to whom these presents shall come—Greetings:

Whereas, in the proclamation issued by me on the 12th day of September, 1958, the public senior high schools of the Little Rock School District were ordered closed, effective at 8 o'clock a.m. Monday, September 15, 1958, and a special election was ordered to be held in the Little Rock School District on Tuesday, October 7, 1958; and

Whereas, since the date of issuing the aforementioned proclamation, I have determined that such election should be held at an earlier date;

Now, Therefore, I, Orval E. Faubus, Governor of the State of Arkansas, acting under the applicable provisions of Act No. 4 of the Acts of the Second Extraordinary session of the Sixty-First General Assembly, approved September

12, 1958, do hereby by public proclamation amend the last paragraph of said September 12, 1958, proclamation to read as follows:

"(B) That a special election be held in the Little Rock School District on Saturday, September 27, 1958, in the manner provided by law in said Act No. 4."

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed. Done in office on this 16th day of September, 1958.

s/ Orval E. Faubus
Governor

* * *

Exhibit "E"

Notice is hereby given that a special election will be held in the

LITTLE ROCK SCHOOL DISTRICT

on Saturday, September 27, 1958, between the hours of 8 a.m. and 6:30 p.m., at which all qualified electors within the district shall have an opportunity to vote on the following propositions:

FOR RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE LITTLE ROCK SCHOOL DISTRICT ..... ☐

AGAINST RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE LITTLE ROCK SCHOOL DISTRICT ..... ☐

The County Board of Election Commissioners shall designate all polling places, provide the election supplies, appoint the judges and clerks for holding the elections, and shall otherwise have supervision over the conduct of the election. At the close of the election, the judges at each polling place shall make a return of the votes, certified by the clerks of the election, and file it in the office of the County Clerk of the county in which said district is administered, for immediate delivery to the County Board of Election Commissioners, which said Board shall immediately, but not later than the fifth (5th) day next following the election, proceed to ascertain and declare the result of the election and certify its findings to the Governor.

This notice of Special Election is given pursuant to the provisions of Act 4 of the Acts of the Second Extraordinary Session of the Sixty-First General Assembly approved September 12, 1958.

IN WITNESS WHEREOF, I have hereunto set my hand caused the Great Seal of the State of Arkansas to be affixed. Done in office this 16th day of September, 1958.

s/Orval E. Faubus
Governor

* * *

Petition for Order Against Leasing

On the following day, September 24, 1958, the Plaintiff Negro school children filed a petition in the federal district court asking an order restraining the school board from conveying, leasing, or otherwise transferring title to school property to private corporations; or, if such transfer should be allowed, an order requiring the operation of private schools in a nondiscriminatory manner. Reproduced below are the Negroes' motion for further relief, and the memorandum of points and authorities on which they relied.

MOTION FOR
FURTHER RELIEF

Plaintiffs, for themselves and all other members of the class which they represent, move this Court for (1) an order restraining defendants, their agents, successors or assigns, from conveying, leasing, or otherwise transferring title, possession or operation of Central High School, or any other public school property, to the Little Rock Private School Cooperation or any other corporation, association, partnership or individual, or (2) in the alternative, for an order de-

creeing that if said Central High School or any other public school property is conveyed, leased or otherwise transferred to the Little Rock Private School Corporation, or any other corporation, association, partnership or individual, the conveyance, lease or transfer must provide that said schools be operated pursuant to the plan of integration heretofore approved by this Court and must not, directly or indirectly, operate so as to discriminate against the members of any race, including especially plaintiffs and the other members of the class which they represent; and, as grounds therefor, plaintiffs represent to the Court as follows:

1. That on September 12, 1958, the Supreme Court of the United States "ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in Brown v. Board of Education, 347 U.S. 483; 349 U.S. 294, be reinstated." This order became "effective immediately" and was "communicated forthwith to the District Court for the Eastern District of Arkansas."

2. Notwithstanding the entry of said judgment, defendants herein have not proceeded with the School Board's plan for desegregation in compliance with the decision of the United States Supreme Court in Brown v. Board of Education, supra.

3. That thereafter, pursuant to legislation enacted on August 28, 1958, by the 61st General Assembly of Arkansas in Special Session, all four senior high schools in Little Rock, including Central High School where certain of the plaintiffs were enrolled in accordance with defendants' plan for desegregation, were closed and a special election to determine whether voters in the Little Rock School District want said schools to remain closed or reopen on a desegregated basis was called for September 27, 1958.

4. That on September 17, 1958, the petition and articles of incorporation of the Little Rock Private School Corporation were approved by the Circuit Court of Pulaski County, Arkansas; that said Corporation's purposes envision the conduct and maintenance of Central High School and other public schools as "private schools" on a racially segregated basis; and that said Corporation was chartered with the expectation that the special election called for September 27, 1958, would vote down the reopening of Central High School and the other three senior high schools on a nonsegregated basis.

5. That plaintiffs are advised and on information and belief allege that following the incorporation of the Little Rock Private School Corporation, defendants have considered and contemplate the conveyance, lease or transfer of Central High School and/or other Little Rock schools to the Little Rock Private School Corporation in the event that a majority of the voters in the special election vote against reopening said Central High School and the other secondary schools on a desegregated basis.

6. That such conveyance, lease or transfer from the defendants to the Little Rock Private School Corporation would render the decrees of this Court as well as the above recited order of the Supreme Court of the United States absolutely nugatory; and would, in fact, prevent this Court from enforcing its lawful orders.

7. That, therefore, either of the orders sought in the alternative by this motion should be granted to vindicate the authority of the Federal Courts and to enforce or protect the rights secured to the plaintiffs under the decrees entered by this Court on August 28, 1956, and September 3, 1957.

Respectfully submitted,
Wiley A. Branton
Thurgood Marshall
Attorneys for Plaintiffs

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

1. This cause was reserved for such further orders and decrees as might be necessary to obtain effectuation of defendants' plan for desegregation in compliance with the decisions of the Supreme Court in the *School Segregation Cases.*

Aaron v. Cooper, 143 F.Supp. 855, 866 (E.D. Ark. 1956), affirmed 253 F.2d 361, 364 (8th Cir. 1957)

see

Brown v. Board of Education, 349 U.S. 294, 301 (1955)

cf.

Rule 7(b), Federal Rules of Civil Procedure

2. It is perfectly clear that plaintiffs' rights to nonsegregated education may not be abridged —nor may defendants avoid their duty to accord plaintiffs these rights—by leasing or transferring operation of public educational facilities to a private instrumentality incorporated for the purpose of carrying out defendants' educational work on a racially segregated basis.

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (C.A. 4th 1945), cert. denied 326 U.S. 721 (1945).

see

City of St. Petersburg v. Alsup, 238 F.2d 880 (C.A. 5th 1957), cert. denied 353 U.S. 922 (1957)

Department of Conservation & Development v. Tate, 231 F.2d 615 (C.A. 4th 1956), cert. denied 352 U.S. 838 (1956)

Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954), vacating 202 F.2d 275 (6th Cir. 1953)

Lawrence v. Hancock, 76 F.Supp. 1004 (S.D. W. Va. 1948)

Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948)

Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E.2d 173 (1944)

Kern v. City Commissioners of the City of Newton, 151 Kan. 565, 100 P.2d 709 (1940)

cf.

Terry v. Adams, 345 U.S. 461 (1953)
Smith v. Allwright, 321 U.S. 649 (1944)
Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), cert. denied 333 U.S. 875 (1948)
Nash v. Air Terminal Services, 85 F.Supp. 345, 549 (E.D. Va., 1949).

3. Where the leasing or transfer of the operation of public facilities to an incorporated private instrumentality is contemplated, it is proper to issue a decree or order which would protect the rights of the plaintiffs in the event of lease or transfer.

Tate v. Department of Conservation and Development, 133 F.Supp. 53, 57, 61 (E.D. Va. 1955), affirmed *Department of Conservation and Development v. Tate*, 231 F.2d 615 (C.A. 4th (1956), cert. denied 352 U.S. 838 (1956).

cf.

Regal Knitware Co. v. National Lab. Rel. Bd., 324 U.S. 9 (1956)

United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897)

Behlmer v. Louisville & N.R. Co., 83 Fed. 898, 903-904 (4th Cir. 1900), reversed on other grounds 175 U.S. 648 (1900).

* * *

Brief of U.S. as Amicus Curiae

On the same day, William P. Rogers, the U. S. Attorney General, filed a brief *amicus curiae* in the district court in support of the Negroes' petition for further relief.

MEMORANDUM OF LAW IN RE PETITION OF SCHOOL BOARD FOR INSTRUCTIONS CONCERNING PROPOSED LEASING OF PUBLIC SCHOOLS

After having been served with the *Petition for Instructions* filed by William G. Cooper, et al., defendants herein, (referred to as the School Board) the United States of America as Amicus Curiae, submits to the Court its views on the legal issues raised by the *Petition*.

From the facts alleged in the Petition, it is apparent that an order of this Court is threatened with non-compliance.

1. *The Proposed Action Would Be In Violation Of This Court's Existing Orders.*

On August 28, 1956, this Court decreed:

"IT IS ORDERED AND ADJUDGED that the plan of school integration of the Little Rock School District officially adopted by the Board of Directors on May 24, 1955,

be and the same hereby is in all things approved, and that the prayer of the complaint of the plaintiffs for a declaratory judgment and for injunctive relief be and is denied.

"IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction of this case be and is retained for the purpose of entering such other and further orders as may be necessary to obtain the effectuation of the plan as therein outlined and set forth."

On September 3, 1957 this Court expressed the following conclusion and promulgated the following order:

"It is concluded that the defendants should be directed and ordered to integrate in the Little Rock School District the senior high schools immediately and without delay, and thereafter to pursue the plan heretofore approved by this Court.

"It is, therefore, by the Court ordered that the defendants, and each of them, as the Little Rock School Board and as the Superintendent of Little Rock Public Schools, integrate in accordance with the plan approved by this Court the senior high school grades in the Little Rock School District forthwith."

The Supreme Court by its order of September 12, 1958 expressly reaffirmed these orders.

The Plan of Integration referred to in the order required the enrollment in Central High School of certain Negro children, including the following six: Carlotta Walls, Elizabeth Eckford, Gloria Ray, Jefferson Thomas, Martha Mothershed, and Melba Patillo.

From the facts alleged in the Petition, it is apparent that the Defendants request permission to participate in a plan whereby Central High School will be operated without permitting these six children to attend. Thus, the Petition alleges that the Defendants are willing to lease the high school to a corporation which will endeavor to operate it as a school on a racially segregated basis.

[*Teacher Source Unexplained*]

We are not informed by defendants' Petition as to the source of the teachers and other educational personnel to be employed in the proposed private schools. The Board does state, "If leases are consummated with such private organizations, they will then, upon accreditation of the schools, be entitled to state financing under the terms of Act 5 of 1958." If it is contemplated that any teachers or other educational personnel now employed at Central High School or other schools under control of the defendant School Board are to be used in the proposed schools, or if public money of the State of Arkansas or any of its subdivisions are to be used to finance the schools to be operated by a corporation on lease from the School Board, then such facts would make even more transparent the sham and artifice proposed, and would thus provide additional cogent reasons why such lease or transfer would be an evasion of and in violation of the existing orders of this Court as confirmed by the Supreme Court.

The only difference between the school as proposed to be operated and the school as operated prior to the entry of the order in question is the use of a private corporation rather than a public agency for the school's administration. The corporation referred to is a newly formed corporation whose incorporators have no educational experience and no academic accreditation. They own no school, they employ no teachers, and they have no financial resources of their own which would permit them to buy or rent a school or employ teachers.

The status of the school as a public institution is not changed by projecting into its operation a private corporation of this nature. Consistently and unequivocably the Courts have held that the superimposition of such a corporation does not excuse a state institution from non-compliance with the Fourteenth Amendment or with orders establishing Fourteenth Amendment rights.

[*Purpose of Action*]

It is clear from all the facts that the proposed action here is part of a plan to bring about the segregation of Negro school children in violation of the existing orders of this court.

The mere fact that the contemplated discriminatory action would be taken under the subterfuge that it was the act of a "private" corporation would not take it out of the ban of the Fourteenth Amendment or the ban of this court's specific orders adjudicating rights under the Fourteenth Amendment. Discriminatory acts have been termed "state action" under the Fourteenth Amendment in the following two principal situations: (1) where the persons performing such acts are exercising a govern-

mental function; or (2) where the state maintains elements of control over the activities of the persons.

In Derrington v. Plummer, 240 F.2d 922 (5 C.A. 1956). *cert. den.*, 352 U.S. 838 (1957), a county leased a cafeteria in a newly constructed courthouse to a private tenant who thereupon excluded persons merely because they were Negroes. The purpose of the lease was to furnish cafeteria service to those persons who happened to be in the courthouse. If the county performed this service itself this would have been state action in violation of the Fourteenth Amendment. The fact that the services were rendered through the instrumentality of a lessee did not insulate the action from the operation of the Fourteenth Amendment, and the court held the discriminatory conduct of the tenant to be as much state action as would have been the action of the county itself. The court pointed out that the courthouse had been completed with public funds for the use of citizens generally. In a dictum, the court indicated that a sale of *surplus* county property and a later use by a private party would not constitute prohibited state action; nor would lease of property not used or needed for county purposes, *where there was no purpose of discrimination, or control retained by the county,* constitute state action.

Similarly, in Dept. of Conservation & Development v. Tate, 231 F.2d 615 (4 C.A. 1956) the court upheld a decree providing that if a state park should be leased, the lease could not operate so as to discriminate against members of any race.

An analogous situation to that presented by private use of state physical facilities was considered in Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4 C.A. 1945), cert. den., 326 U.S. 721 (1945). A Negro girl was refused admittance to a library training class which had been originally established by a private donor but to which the city contributed funds.[1] The physical plant used by the library system was owned by the city of Baltimore. The court here applied the state instrumentality theory and held the discrimination violative of the Fourteenth Amendment.

The significance of the use of state-owned facilities in cases involving the discriminatory acts of a private body is even more clearly exemplified in Lawrence v. Hancock, 76 F.Supp. 1004 (S.D. W. Va., 1948). There, the city of Montgomery, West Virginia at a rental of $1 per year leased a swimming pool and its appurtenances to a private corporation, formed for the purpose of operating the swimming pool. The corporation was not permitted to make any profit from operation of the pool. It excluded Negroes. In finding that the refusal to admit Negroes was an exercise of governmental power by the private corporation and hence a violation of the Fourteenth Amendment, the court stated (p. 1008):

> "The power to lease does not include the power to discriminate against members of a minority race in the exercise of their constitutional rights; nor can the City by such a lease as we have here relieve itself from its constitutional obligation to afford to all its citizens equal rights in the use of the public swimming pool which is the subject of the lease. * * *
>
> "From these facts it is clear that the Montgomery Park Association was a mere agent or instrumentality through which the City of Montgomery operated the swimming pool, at least to the extent that the rights of its citizens to use the pool are affected. * * *
>
> "Justice would be blind indeed if she failed to detect the real purpose in this effort of the City of Montgomery to clothe a public function with the mantle of private responsibility. 'The voice is Jacob's voice,' even though 'the hands are the hands of Esau.' It is clearly but another in the long series of stratagems which governing bodies of many white communities have employed in attempting to deprive the Negro of his constitutional birthright: the equal protection of the laws." (Citing Smith v. Allwright, *infra*, Rice v. Elmore, *infra*, among others)

The Lawrence and Kerr cases were distinguished in Norris v. Mayor and City Council of Baltimore, 78 F.Supp. 451 (D. Md. 1948),[2] where a private art school had denied admission to a Negro. The school rented from the city only one building (at $500 rental, while the commercial rate was $12,000), received 23% of its funds from the state, and was not controlled or regulated by the city or state in any manner. The private art school and its facilities

1. 99% of the library's total budget was contributed by the city and state.

2. Opinion by the district judge who was reversed by the Court of Appeals in the *Kerr* case, *supra*.

were not in any way a part of the public school system of the state. The court found no state action in the operation of the school, pointing to the long history (well over 50 years) of its operation as a private institution and to the absence of any "stratagem or device for the express purpose of excluding negroes." (p. 461)

Courts, including the Supreme Court, have recognized the necessity of examining the circumstances in which state officials act, in order to ascertain whether a purpose of discriminatory exclusion is present. If such a purpose is apparent the courts are likely to find prohibited state action. Illustrative of this principle are the white primary cases where legislative attempts to disassociate the state from discriminatory denial of voting rights were held ineffective. Rice v. Elmore, 165 F.2d 387 (4 C.A. 1947), cert. den. 333 U.S. 875 (1948); Terry v. Adams 345 U.S. 461 (1953).

On the above authorities the circumstances in which public school buildings are turned over to private bodies is a particularly important factor in determining whether the action is a stratagem or device for the purpose of excluding Negroes. In the case at bar the conclusion that the proposed lease is just such a stratagem is admitted, proclaimed, inescapable—and therefore decisive of the issue before this court.

2. *If this Court should rule that the Little Rock School Board can lawfully permit the Senior High Schools to be operated by a corporation, the School Board should be instructed that the operator of such schools must admit and enroll in Central High School the Negro students eligible to attend that school under the School Board's plan of integration.*

Alternatively, if for any reasons appearing valid to this Court, this Court determines that the present public school system operated by the defendant School Board should be operated in whole or in part by a corporation as lessee of the public school properties, then we submit that the Negro students eligible to attend Central High School, or any other public school operated by the defendants, under the School Board's plan of May 24, 1955, and this Court's orders of August 28, 1956 and September 3, 1957, as confirmed by the Supreme Court, can not be denied admission to Central High School, whoever the operator and under whatever name it is operated. To deny such admission, if and when such schools operated by a corporation are set up, would be to frustrate and obstruct the previous orders of this Court, and to deny to those Negro students the equal protection of the laws already specifically adjudicated in their favor.

In similar situations the courts have consistently held that the constitutional obligation of a state and its instrumentalities not to deny the equal protection of the laws with respect to the operation of public facilities on a nonsegregated basis cannot be avoided by turning such public facilities over to private corporations for operation on a segregated basis. In Derrington v. Plummer, supra, the court pointed out that the county itself could not operate the cafeteria on a racially discriminatory basis and said: "The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself."

Similarly, in Simkins v. City of Greensboro, 149 F.Supp. 562 (M.D.N.C.), affirmed per curiam, City of Greensboro v. Simkins, 246 F.2d 425 (4 C.A. 1957), where the city had leased a public golf course to a nonprofit corporation, the district court enjoined the city and the lessee from discriminating against Negroes in the use of the golf course and stated:

> ". . . Such hitherto sacred rights can not be abridged by a mere lease between the city and a third party and the courts are not made impotent to afford relief. To hold otherwise would open a Pandora's box by which governmental agencies could deprive citizens of their constitutional rights by the artifice of a lease. If the lessee desires to continue to operate the golf course, it must do so without discrimination against the citizens of Greensboro. This public right can not be abridged by the lessee so long as the course is available to some of the citizens as a public park; it can not be lawfully denied to others solely on account of race."

And the Court of Appeals, in affirming, said, ". . . the rights of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property."

This recognition of constitutional rights is by no means confined to the courts of the United

States. As the Ohio Court of Appeals put it in Culver v. City of Warren, 84 Ohio App. 373 (1948):

> "The facts in this case pose a question of constitutional right and privilege which cannot lightly be cast aside by a process of legal legerdemain which has the effect of turning over to a private organization public property for the sole purpose of racial discrimination."

There a swimming pool was leased. The Court of Appeals granted an injunction against racial discrimination.

[*Other Cases*]

Other cases holding that a state or its instrumentalities cannot avoid their constitutional obligation to operate public facilities on a nonsegregated basis by the device of leasing such facilities to a private operator are Department of Conservation and Development, Division of Parks, of the Commonwealth of Virginia v. Tate, 231 F.2d 615 (4 C.A. 1956) [state parks]; Lawrence v. Hancock, 76 F.Supp. 1004 (S.D. W. Va. 1948) [swimming pool]; see also Muir v. Louisville Park Theatrical Association, 347 U.S. 971, reversing per curiam, 202 F.2d 275 (6 C.A. 1953) [amphitheater in public park].

Since the senior high schools in Little Rock will continue to be publicly owned property, the Board has already suggested that the State will contribute financially to the school operated by the corporation, and under the contemplated leasing arrangement the School Board's teachers and staff would presumably continue their functions, the interest and participation of the state and its agencies in the private school operation would be far more pervasive than in the Girard College case. There the Supreme Court held that even though the college was created by a private trust, since the trust was administered and the college operated by an agency of the State of Pennsylvania, the operation of the college on a racially discriminatory basis was state action in violation of the Fourteenth Amendment. Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230.

Also applicable here are the cases holding that a state cannot avoid its obligation under the Fifteenth Amendment not to deny the right to vote on account of race by permitting state primaries to be conducted by private groups. As the Supreme Court said in Terry v. Adams, 345 U.S. 461, 469:

> "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election."

To the same effect are Smith v. Allwright, 321 U.S. 649; Perry v. Cyphers, 186 F.2d 608 (5 C.A.) Baskin v. Brown, 174 F.2d 391 (4 C.A.); Rice v. Elmore, 165 F.2d 387 (4 C.A.)

[*Status as Agent*]

As shown by the cases cited above, if a corporation were permitted by the School Board to operate the senior high schools in Little Rock and thus use public property and teachers and other employees of the School Board, that corporation would be simply an agent of the School Board to which the Board would have attempted to delegate its duty to operate the public senior high schools in Little Rock. Under Rule 65(d), F.R.C.P., this Court's order of September 3, 1957, requiring the School Board to integrate the senior high schools in the Little Rock School District immediately in accordance with its plan of integration, is binding not only upon the defendant directors of the Little Rock School District but equally upon "their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Hence, operation of the senior high schools by a corporation on a segregated basis would be a direct violation of this Court's order, both by the directors of the School District and their agent, the corporation. The obligation of the defendants to comply with this Court's order of September 3, 1957, cannot be avoided by their permitting their agent to do indirectly that which the defendants may not do directly. Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9.

CONCLUSION

The interest of the United States of America as Amicus Curiae in this proceeding is its responsibility that the orders of United States Courts be complied with. Therefore, we suggest that this Court enter an Order either: (1) instructing defendant School Board that the action proposed in their Petition would violate the Orders of this Court previously entered; or, alternatively, if this Court were to rule that the School Board may lease the senior high schools to a corporation, (2) instructing, without approving such action, the Board that any such lease or transfer of the schools must be on terms which will explicitly require the operator to permit the Negro students eligible under the School Board's plan to attend Central High School, and that if the proposed action is taken, the corporation or any person acting on its behalf operating Central High School or other schools now under control of defendant will, as the successors and assigns of defendant School Board, be subject to the previous orders of this Court in regard to Negro students eligible to attend such schools in all respects as if it or they had been named therein.

Whatever form of Order is entered, the Court should, as it did in its previous Orders, retain jurisdiction of the case for the purpose of entering such other and further orders as may be necessary to obtain the effectuation of the Plan of Integration as heretofore approved by this Court.

UNITED STATES OF AMERICA,
Amicus Curiae

* * *

District Court Opinion and Orders Denying Petitions of Negroes and School Board

On the following day, September 25, 1958, United States District Judge John E. Miller, discussed both the petition by the school board and the petition by the Negro plaintiffs, and entered orders denying them both.

ORAL OPINION

MILLER, District Judge.

Gentlemen, I have always been opposed to precipitant action by a court or any action that would indicate that the court has not considered the contentions of the parties before it. I think every citizen has the right to his day in court and to have his contentions, although they may not be valid contentions, considered by a court in the determination of any question before it.

I realize the situation that is confronting the defendants in this case; that is confronting the plaintiffs and everyone that is involved.

You remember that I heard the first case, that is, I heard this case when it was first before the court at Little Rock when the plan for integration was presented. That plan was opposed by the plaintiffs on the ground that it postponed integration for an unreasonable time.

[*Approved After Trial*]

That plan was approved after a full trial and was later affirmed by another court. Then the matter proceeded under the plan until conditions arose last year which made it necessary, or, at least the court so found at that time to enter its order, of September 3rd, 1957. In that order the court said:

> "It is concluded that the defendants should be directed and ordered to integrate in the Little Rock School District and senior high schools immediately and without delay, and thereafter to pursue the plan heretofore approved by this court.
>
> "It is, therefore, by the Court ordered that the defendants, and each of them, as the Little Rock School Board and as the Superintendent of Little Rock Public Schools, integrate in accordance with the plan approved by this Court the senior high school grades in the Little Rock School District forthwith."

That is the order that is in effect today. That is the last order that was entered in reference to the plan, and that was entered by the court, as I say, on September 3rd, 1957. It was based upon the order that the court had entered on August 28th, 1956, in which the court said:

"It is ordered and adjudged that the plan of school integration of the Little Rock School District officially adopted by the Board of Directors on May 24, 1955, be and the same hereby is in all things approved, and that the prayer of the complaint of the plaintiffs for a declaratory judgment and for injunctive relief be and is denied.

"It is further ordered and adjudged that jurisdiction of this case be and is retained for the purpose of entering such other and further orders as may be necessary to obtain the effectuation of the plan as therein outlined and set forth."

[*No Jurisdiction Question*]

Thus, there isn't any question as to the jurisdiction of the court insofar as the execution of the plan is concerned to enter such orders as is necessary, unless the court has been limited by other valid legislation or other valid court orders of a court of greater authority. There has been no such orders entered by any court. As the matter now stands, that decision of September 3rd, 1957 has been approved by the Supreme Court of the United States as the order under which the integration is to be carried out in accordance with the plan. And the School Board is here today asking for instructions. The prayer of the petition is:

"Petitioners ask that this Court at this time instruct them as to whether, under the existing conditions, they would violate any order of this Court in leasing to private institutions the school properties on which the District has heretofore conducted high schools."

The prayer of the plaintiffs themselves is to the effect that the Board of Directors be restrained from leasing the property to a private corporation. In the alternative that if the court does not restrain them from leasing the properties that the court require there to be incorporated in the lease explicit provisions to the effect that any child otherwise qualified shall be admitted to the schools, such private school, or that the schools be privately operated by the lessee without regard to race or color.

That is, as I understand it, the contention of the relief requested by the plaintiffs. Is that right?

Mr. Branton: Yes, sir.

The Court: And the Government comes in and has submitted its brief, which has been supplemented by oral argument, and here is the concluding paragraph of that brief, which was in effect repeated in the oral argument of Mr. MacGuineas, which the court appreciates.

"The interest of the United States of America as amicus curiae in this proceeding is its responsibility that the orders of the United States Courts be complied with. Therefore, we suggest that this court enter an Order either: (1) instructing Defendant School Board that the action proposed in their Petition would violate the Orders of this court perviously entered; or, alternatively, if this court were to rule that the School Board may lease the Senior High Schools to a corporation, (2) instructing, without approving such action, the Board that any such lease or transfer of the schools must be on terms which will explicitly require the operator to permit the Negro students eligible under the School Board's plan to attend Central High School, and that if the proposed action is taken, the corporation or any person acting on its behalf, operating Central High School or other schools now under control of defendant will, as the successors and assigns of defendant School Board, be subject to the previous orders of this court in regard to Negro students eligible to attend such schools in all respects as if it or they had been named therein."

[*Prayer of Defendants*]

I have called your attention to the prayer of the petition of the defendants, the motion of the plaintiffs and the government, who is appearing as a friend of the court. I have done that in order to pose the question that appears to the court of paramount importance. The argument has been made and it is true, I am sure, that the closing of the school is costing that school district and the taxpayers a considerable sum of money every day. Eligible students or children are being denied any school at this time. And cases have been cited and relied upon by Mr. Branton and by the Government which, in effect, hold that any action which intrudes upon or denies any child admittance to a free school is action by a State, although under a subterfuge of lease, transfer, conveyance or otherwise; that the courts will

look through the subterfuge, disregard form and consider substance and strike down any such an arrangement whereby a State seeks to evade or seeks to avoid or deny a constitutional right to any citizen. Most of those cases, as I remember them, arose, not as the result of specific legislation. Some of them may have been by Ordinances, some of them may have been under general statute. But here we have this situation confronting us. The Legislature of Arkansas, the policy making branch of Arkansas, as we all know, was convened in extraordinary session not too long ago. It passed certain legislation.

Act 4 of the Legislature, inter alia, provides:

"The Governor shall, by proclamation filed with the Secretary of State, and with the Board of Directors of any school district affected, and with the County Board of Election Commissioners of the appropriate county:

(a) Order any school or all schools of the district to be closed immediately, and he is hereby specifically empowered to use all forces at his command to execute such order; and

(b) Call a special election to be held in the school district within thirty (30) days thereafter, whenever,

(a) He shall determine–

(b) "integration of the races in any school, or all schools, of the school district has been decreed by an order of any court, and pursuant to the enforcement thereof, the President, or other officer of the United States Government, whether of the executive, legislative, or judicial branch, cause troops, whether regular troops or the federalized National Guard, United States Marshals, or other force at the federal level, to be stationed in, on or about any such public school; or

"(c) he shall determine that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integration of the races in any school within that district."

Section 2 (a)

"The proclamation of the Governor shall fix the date of the election, and the Governor shall give at least five (5) days' notice of such election by publication" and so forth and so on.

Acting under that statute the Governor issued a proclamation closing the schools.

Section 3 of the Act provides:

"Should any member of the school board, or the superintendent, principal or any other supervisory personnel, or any other employee of the district fail or refuse to immediately implement the carrying out of, or carry out, the said closing order, the said failure or refusal shall be cause for immediate removal and the Governor shall declare the office or position of employment vacant; and thereupon the Governor shall, by appointment, fill any such vacancy until the next regular school election or for the remainder of the term of employment."

Section 4:

"Any school closed by executive order authorized by this Act shall remain closed until such executive order is countermanded by proclamation of the Governor filed with the Secretary of State and the Board of Directors of the school district."

The other Act, Act No. 5, which is the Act that the plaintiffs are striking at in asking that any lease executed by the board shall provide that any child otherwise eligible shall be admitted without regard to race or color.

Section 2 of that Act reads:

"Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such school, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order for the benefit of the said school district for maintenance and operation; plus, and also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School

Fund, all as set forth in the budget of the County Board of Education."

The next section deals with the transfer of students and the transfer of funds to any school to which the student might transfer.

[*Validity of Statute*]

It is clear that there is involved here the validity of these two statutes. Regardless of the opinion of the presiding judge of this court might have as to the validity or the action of the Governor in closing the schools and the proposed action of the State Board of Education or the other allocating commissions or other officials of the authority given by the second Act or Act No. 5, to allocate those funds to schools to be operated under and by virtue of the closing order of the Governor. Regardless of my own individual idea of that, of the legality or the constitutionality of those Acts, I don't think this court, sitting as a single judge, has the jurisdiction to pass upon that question.

Section 2281 of Title 28, United States Code, says this:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[*Effect of Act*]

I think that for this court to enter an order now defining or attempting to define any of the terms and provisions of any lease that might be executed by the school board leasing this property, it would be necessary for me to hold these two Acts that I have referred to as unconstitutional. The Act of 1875, which is Section 8518 of the Statutes of Arkansas, gives the school board the right under certain conditions to lease property when it is not in use. That Act may play a part in the ultimate determination of the legality of this entire scheme. It has been construed in certain cases by the Supreme Court of Arkansas, but no case involving a case like this. I think this court is without authority at this time to order or to enter any order directing any lessee or other person that undertakes to operate the schools, if they do undertake to operate it in the public school property, that they shall operate it under the conditions and upon the limitations and restrictions asked in your petition for further relief. I am not determining that question as to the authority or as to whether they can or cannot legitimately operate a school that way, but what I am saying, that under these statutes, this court is without authority to enter such an order at this time. Later the question may well be presented to a court properly constituted to hear it or it may be determined by State Courts whatever the conditions may develop. The thing that gives me more concern is this. I think the School Board from the inception of this controversy has acted in good faith in recognition of its responsibilities as a school board. They are between the horns of the dilemma. Their schools are closed, whether rightfully or legally is a question that I am not saying—not determining. Their schools are closed under a State statute. They have the property on hand. They are charged under the State law with responsibility of operating the schools. Their power to act as directors and the limitations of their power stem from the Statutes of Arkansas. So far as I know, only one provision of that statute has been declared illegal. That was the provision that they should maintain separate but equal facilities. That has been thrown out by the Supreme Court of the United States.

[*Asked About Contempt*]

Now they come here asking whether they will be held in contempt if they lease the school property or if they fail to operate the schools. I am not going to answer that question because they are not in contempt of court yet, certainly, and it would be a strange thing for a court of justice to hold any one in contempt for not complying with an order of the court when he was prevented from doing so by another court of equal or concurrent jurisdiction or legislation.

The board finds itself in this position. I know that they are dedicated men. They find themselves in this position, without a school to operate. They have lost control of the schools if these Acts are enforced. I think it well for us at this time to ask, just what has the Supreme Court of the United States held. That question

was best answered by Judge Parker in the case of Briggs v. Elliott, one of the original cases that went to the Supreme Court, and after it had been reversed. And you lawyers, I know, had the same respect for Judge Parker that I did. I think he was one of the greatest Circuit Judges in the United States. It was a tragedy when he was denied confirmation as an Associate Justice of the Supreme Court. Here is what he said the court had decided in the Brown cases.

[*Not to Regulate Schools*]

"It has not decided that the federal courts are to take over or regulate the public schools of the states." (And that is something that ought to be borne in mind. The board of directors of a school district nor the students in the school district, are not wards of this court or any federal court, and it is not our duty to operate or to regulate or to take them over.)

"It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny—(this is important) What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains."

(I know the argument here is that if this lease is executed that it will only be a subterfuge for the maintaining the schools under private ownership, whereas, they would, in fact, be maintained by the State. That may be true. If it is true relief can be obtained by and in a proper court.)

> "This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental powers to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." Briggs v. Elliott, 132 F. Supp. 776-777.

[*No Authority for Action*]

For this court to hold today—to grant the prayer of the plaintiffs for additional relief and to follow the suggestion of the Government, would require the court to hold that these acts of the Legislature are invalid; that they infringe upon the Constitution of the United States and that they are therefore invalid and of no force and effect. Under the statute this court doesn't have the right to make such an order. I realize the predicament of the board. I realize the pressure that it is under, but it has never been the law, gentlemen, that a court should render an advisory opinion. That has been the law as long as we have had a law. It is still the law. I cannot assume the responsibility of rendering an advisory opinion as to what you should do or shouldn't do. That is a matter that you will have to depend upon the advice of your counsel, and you have eminent counsel, able counsel. As it now stands I cannot see where this court can enter any order at this time on any of the issues raised here. I have no desire whatsoever to shirk my responsibility and I am not going to shirk my responsibility, but I think I would be violating the law myself if I undertook to do it. I would certainly be violating the principle that the court is bound by and for that reason I am going to deny the petition of the defendants for instructions. I am going to deny and dismiss the motion of plaintiffs for further relief, all without prejudice. In order words, I don't want to enter any order that might be construed as res adjudicata or an adjudication, because I think I can see that there will probably be other litigation in a properly constituted court, and this court doesn't desire to do anything that would preclude anybody from having their day in court.

That will be the order of the court at this time.

Court will be in recess.

Mr. Branton: May I ask one question?

The Court: Yes.

Mr. Branton: In the light of the court's ruling, I wonder if the court would consider our

motion as amended and ask the court to invoke immediately a three-judge court to determine these questions and to submit—

The Court: I rather you would file a motion.

Mr. Branton: Or in the alternative would the court give us an appealable order. I don't mean that as any reflection on the court, but because of the seriousness of the problems which we are confronted with, so that machinery may be put in motion before these subsequent events arise.

The Court: If you want to appeal from the order denying your motion for further relief, I will just dismiss it and that will probably be an appealable order, I don't know. If you want to. I will take out of the order the words, "without prejudice".

Mr. Branton: Could the court hold that in abeyance until we would have an opportunity to discuss it.

The Court: Yes. If you desire that a three-judge court be convened, I think it would be better. I said, I am not going to render any advisory opinion and I am not going to, but these statutes here are ultimately going to have to be before some court.

Mr. Branton: May I ask the court also, in all seriousness, would the court have to determine the validity of either of those statutes to grant the alternative relief which we asked for?

The Court: The way I construe it, it would. Court will be in recess.

* * *

ORDER

On this September 25, 1958, comes on for hearing plaintiffs' motion for further relief heretofore filed in the above styled cause, the plaintiffs appearing by Mr. Wiley A. Branton, their attorney, the defendants appearing by Messrs. A. F. House, John H. Haley and Richard C. Butler, their attorneys, and the United States of America, amicus curiae, appearing by Messrs. Osro Cobb and Donald MacGuinneas. Arguments of counsel were heard, and upon consideration of the said motion, arguments of counsel and the entire record of this cause, including the petition for instructions filed herein by the defendants, the School Directors and Virgil T. Blossom, Superintendent of Schools, and the Court being well and sufficiently advised in the premises is of the opinion that the said motion for further relief should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiffs' motion for further relief be and hereby is denied and dismissed.

* * *

ORDER

On this September 25, 1958, comes on for hearing petition for instructions heretofore filed by the defendants, William G. Cooper, Harold Engstrom, Wayne Upton, Dale Alford and R. A. Lile, Directors of the Little Rock School District, and Virgil T. Blossom, Superintendent of the Little Rock School District, the said defendants appearing by Messrs. A. F. House, John H. Haley and Richard C. Butler, their attorneys, and the United States of America, amicus curiae, appearing by Messrs. Osro Cobb and Donald B. MacGuinneas, its attorneys. Arguments of counsel were heard, and upon consideration of the said petition, arguments of counsel, and the entire record of this cause, the Court being well and sufficiently advised in the premises is of the opinion that the said petition for instructions should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendants' petition for instructions be and hereby is denied and dismissed.

* * *

School Board Resolution Authorizing Lease

On September 29, 1958, the Little Rock School Board adopted a resolution declaring the closed Little Rock public school properties surplus and authorized their leasing to the Little Rock Private School Corporation.

RESOLUTION

WHEREAS, by proclamation of September 12, 1958, Governor Orval E. Faubus ordered closed the high schools located in the Little Rock Special School District, namely: Central High School, Hall High School, Horace Mann High School, and Technical High School; and

WHEREAS, the said high schools were closed pursuant to said proclamation, are not now in use, and will not be required for public school purposes until the Little Rock Special School District is again enabled by law to operate public high schools, or requires such properties or a part thereof for further expansion of its other educational programs; and

WHEREAS, the Little Rock School Board is desirous of aiding any feasible plan leading to a high school educational program, although it is capable of and would prefer to operate its high schools as a part of the system of public education; and

WHEREAS, Governor Orval E. Faubus has called upon the School Board to execute to a private group a lease of the high school properties for privately operated high schools; and

WHEREAS, The Little Rock Private School Corporation, a non-profit educational organization, has professed to be ready, willing and able to lease said high school properties and operate private schools therein; and

WHEREAS, this Board was in doubt as to the efficacy of such a leasing arrangement, the School Board petitioned United States District Judge John E. Miller to determine whether such would be violative of the orders of his court, but Judge Miller refused to advise; and

WHEREAS, further legal action to clarify the School Board's status cannot be taken since it would work a postponement of the commencement of private school operations, which postponement would further impair the high school educational program in the Little Rock Special School District;

NOW, THEREFORE, BE IT RESOLVED that the properties known as Central High School, Hall High School, Horace Mann High School, and Technical High School, be and the same hereby are, declared to be surplus school property until such time as the Little Rock School District requires all or a part thereof for the operation of its public education program; and

BE IT FURTHER RESOLVED that Wayne Upton and Harold Engstrom, Jr., President and Secretary, respectively of the Board of Directors of the Little Rock School District, be and the same are hereby authorized to execute a lease and sublease to the Little Rock Private School Corporation for such properties and upon such terms and conditions as are contained in the lease form attached to and incorporated in this Resolution; subject, however, to prior approval as to validity by the Attorney General of the State of Arkansas, such opinion to be requested of him by Wayne Upton, President. The question requested of him is whether the Board may lease surplus public school houses to private schools through the proposed lease by Act No. 46 of the adjourned session of the Arkansas Legislature passed December 7, 1875, and now cited as Sec. 80-518 of the Arkansas Annotated Statutes (1947).

The members of the Little Rock Private School Corporation are:

Dr. T. J. Raney, President
Mrs. Willie P. Oates, Vice President
Ben C. Isgrig, Secretary
Malcolm C. Taylor, Treasurer
Hershal Goodman
J. C. Mitchell

* * *

Agreement of Lease; Teachers' Contract

Immediately after the school board authorization resolution, the school properties were leased to the Little Rock Private School Corporation and the corporation announced a proposed contract for the hiring of teachers. The agreement of lease and sublease, and the proposed teachers' contract are reproduced below:

AGREEMENT OF LEASE
AND SUBLEASE

WHEREAS, on September 12, 1958, Hall High School, Central High School, Horace Mann High School, and Tech High School were closed by proclamation of the Governor of the State of Arkansas pursuant to the authority of Act 4 of the Second Special Extraordinary Session of the 61st General Assembly of the State of Arkansas, and

WHEREAS, said buildings together with all equipment and teaching aids located therein and used in connection therewith have been declared surplus by the Little Rock School Board,

NOW THEREFORE THIS AGREEMENT, entered into this 29th day of September, 1958, by and between Little Rock School Board, hereinafter called "Lessor," and The Little Rock Private School Corporation, hereinafter called "Lessee," WITNESSETH:

Lessor leases to Lessee the following described premises in the City of Little Rock, County of Pulaski, and State of Arkansas to-wit:

Beginning on the South line of West 14th Street in the City of Little Rock, Arkansas, at its intersection with the West Line of Park Avenue, thence West along the South line of West 14th Street 1019 feet; thence South 45 degrees West 662′ to the North line of West 16th St.; thence East along the North line of West 16th St. 1019′ to the intersection of the North line of West 16th St. with the West Line of Park Avenue; thence North along the West line of Park Avenue 662′ more or less to the point of beginning; all of Blocks 7 and 12, WORTHEN & BROWN'S ADDITION to the City of Little Rock, Arkansas; all of Blocks 9 and 10, PARK ADDITION to the City of Little Rock, Arkansas, all of which is popularly referred to as Central High School, excepting, however, that portion of the above-described property which is popularly known as Quigley Stadium and is surrounded by a concrete wall 10′ in height.

Lots 7 to 12 inclusive, Block 38, BRAGG'S SECOND ADDITION North half of that portion of 25th Street (now closed) South of Lot 7, Block 38;

Lots 1 to 10 inclusive, and North 37 feet of Lot 11, Block 39, BRAGGS SECOND ADDITION (North 32′ of Lot 9 and all of Lots 10, 11 and 12, Block 40, BRAGGS SECOND ADDITION to the City of Little Rock, Arkansas, and the South half of that portion of 25th Street (now closed) lying North of said Lot 12; (East 3′ of Lots 1, 2, 3, 4, and East 3′ of that part of 25th Street lying between Lot 1 Block 40 and Lot 6, Block 38, all in Block 40, BRAGG'S SECOND ADDITION to the City of Little Rock; (McAlmont Street lying between Blocks 28 and 40 and Block 39 Part SW ¼ SE ¼, Sec. 11, Ts. 1 N., R 12 W., described as beginning at a point where the North line of East Roosevelt Road intersects the West line of SW ¼ SE ¼; thence North along West line of SW ¼ SE ¼ 450 feet; thence East 570 feet; thence South 450 feet to North boundary line of East Roosevelt Road; thence along North boundary line of East Roosevelt Road to beginning, all of which is popularly referred to as Horace Mann High School.

NW ¼ of SE ¼ Section 36, Ts. 2 N., R. 13 W., except that part described; Beginning at NW corner NW ¼ SE ¼; thence South along West line NW ¼ SE ¼ 291 feet; thence East at right angles to West line NW ¼ SE ¼ 60 feet; thence left along curve having radius of 180.87 feet a distance of 138.9 feet; thence right along curve radius 120.8 feet; 98.1 feet; thence East parallel to and 195 feet South of North line said NW ¼ SE ¼ 684.4 feet; thence right along curve radius 280 feet, 208.2 feet; thence left along curve radius 310.4 feet, 212.3 feet to intersection of East line NW ¼ SE ¼; thence North along East line NW ¼ SE ¼ 346.8 feet to Northeast corner NW ¼ SE ¼; thence West along North line NW ¼ SE ¼, which is also South line Pine Manor Addition 1336.4 feet to point of beginning; containing 6.99 acres, more or less; That part NW ¼ SE ¼ Sec. 36, Ts. 2 N. R. 13 W., here bargained, granted and sold, is subject to Easement for Street over South 20 feet; and subject to easement for utility lines over South 20 feet; also easement if any for roadway over West 10 feet said land; subject to easement 50 feet wide to City of Little Rock in Court Record 50 at page 431, and all of which is popularly referred to as Hall High School,

and Lessor subleases to Lessee the following described premises in the City of Little Rock, County of Pulaski and State of Arkansas, to-wit:

Part of SW ¼ NE ¼ SW ¼. Section 6, Ts. 1 N., R. 12 W. Beginning 20 feet North of and 40 feet West of the SE corner of SW ¼ NE ¼ SW ¼; thence West along North line of West 8th Street 800 feet; thence North 31 degrees East 800 feet; thence East to a point 40 feet West of the centerline of Fair Park Boulevard Drive; thence Southerly along a line parallel to and 40 feet West of center line of Fair Park Boulevard

Drive to the point of beginning, popularly referred to as Tech High School,

which said last above described premises were leased to Lessor by the City of Little Rock by written agreement dated August 18, 1947, and Lessee accepts said premises subject to all terms and conditions of such agreement which are incorporated by reference herein, and Lessor also leases to Lessee all equipment and teaching aids located or used in connection with all of the above described real estate.

The term of this lease is for the period commencing September 30, 1958, and ending June 1, 1965, or for such time as the said leased property is not required for public education, whichever is shorter; provided, however, this lease shall terminate immediately and be held for naught in the event it is determined improper or invalid by final judgment of a court of competent jurisdiction.

It is agreed that at the time of execution of this lease the rental value of the leased property cannot be accurately determined by either Lessor or Lessee. It is accordingly agreed that at the conclusion of each school semester the rental value shall be determined by three arbitrators, one to be chosen by Lessor and one by Lessee and the third chosen by these two. The standard of value shall be the actual market rental value of the leased property used for school purposes, provided, however, that the rental per annum shall not be less than $10,000. Should Lessee be prevented from carrying out the objective of its incorporation, the amount of rental during possession shall be determined by allocating the said rental on a monthly basis during the period of usage by the Lessee.

The parties hereto covenant as follows:

1. The leased premises and personal property will be used by the Lessee only for the following purpose, to-wit: (a) to establish, conduct and maintain private schools of the highest educational standards in the City of Little Rock, County of Pulaski, State of Arkansas, where students may obtain an education comparable to that obtainable in the Class A public schools of this state, including the extra-curricular activities normally enjoyed by students in other schools, with particular reference to fitting and preparing said students mentally, morally and physically for higher education in colleges and universities, or for employment upon the completion of technical training and (b) to carry out the policies set forth in Sections E, F and G of Chapter VIII of *Administrative Policies of the Little Rock School District*, published September 1955, which is hereby incorporated herein by reference.

2. Lessee will not make any alterations, additions or improvements without the Lessor's prior written consent.

3. Lessor agrees that it will (a) maintain the leased property in good condition for the purposes of the Lessee, (b) furnish and pay for any guards necessary to insure the protection of the leased property, (c) pay all debt service charges and expenses on any existing debt encumbering the leased property, (d) keep said leased property insured to the same extent as the same is at the date hereof and (e) pay all utility services supplied said leased property.

4. The printing plants, including equipment and supplies therein, which are situated in Central High School and Horace Mann High School are leased hereunder for educational and training purposes only.

5. In the event of a substantial destruction (substantial destruction as herein used means destruction which will cost 50% or more of the value of the improvements prior to destruction to restore such improvements) of any of the leased property by fire, cyclone or act of God, this lease may be terminated on notice from the Lessor to the Lessee as to the portion of the leased property so destroyed; or Lessor may elect to rebuild or replace for the use of the Lessee such portion of the leased property so destroyed, and in that event Lessor shall notify Lessee within sixty days after said destruction, and shall then proceed with all reasonable diligence, delay due to adjustment of insurance loss and other unavoidable delays excepted, to restore such destroyed property and this lease shall continue in full force and effect except that, as the sole and exclusive remedy of the Lessee, there shall be a proportionate abatement of the rent payable by the Lessee during the time such portion of the property which is destroyed is untenantable or in part untenantable. In the event of a partial destruction (partial destruction as herein used means destruction which will cost less than 50% of the value of the improvements prior to destruction to restore such improvements) of any of the leased property by fire, cyclone or Act of God, the Lessor will repair said leased property for the use of the Lessee, and this lease shall

continue in full force and effect, except that, as the sole and exclusive remedy of the Lessee, there shall be a proportionate abatement in the rent payable by the Lessee during the time the leased property is untenantable or in part untenantable.

6. This lease and sublease shall not be renewable except by written agreement between Lessor and Lessee. Should Lessee be allowed to remain in possession after termination hereof, either in course or by reason of the breach of any of the provisions hereof by the Lessee, or should Lessor accept any rent after such termination, then neither the remaining in possession nor the acceptance of the rent shall be deemed a renewal hereof or a tenancy from year to year, but, on the contrary, the status of the Lessee shall be deemed that of a tenant at will, and the Lessee will immediately vacate the premises upon being notified to do so by the Lessor.

7. Lessee hereby subordinates this lease and sublease to any mortgage, deed of trust, or encumbrance which the Lessor may have placed or may hereafter place on the premises. Lessee agrees to execute on demand any instrument which may be deemed necessary or desirable to render such mortgage, deed of trust, or encumbrance, whenever made, superior and prior to this lease and sublease.

8. On termination of this lease and sublease in course, Lessee agrees to surrender possession of the demised premises without demand.

9. In the event any changes, alterations, or additions are required by any law, ordinance or regulation of the Fire Department or Board of Health due to the occupancy of Lessee for the purposes expressed in paragraph 1 hereof, then the cost of such change, alterations or additions shall be paid by the Lessee.

10. If the above property or any part thereof be subjected to any eminent domain proceeding, the lease and sublease shall terminate. In any condemnation proceedings, all damages shall be payable to Lessor.

IN WITNESS WHEREOF, the parties have executed this lease on the date first above written.

LITTLE ROCK SCHOOL BOARD
By s/ Wayne Upton,
President
s/Harold Engstrom, Jr., Secretary

THE LITTLE ROCK PRIVATE SCHOOL CORPORATION
By s/ T. J. Raney,
President
s/Ben C. Isgrig, Jr., Secretary

* * *

Teacher's Contract

THE LITTLE ROCK PRIVATE SCHOOL CORPORATION
TEACHER'S CONTRACT

(For Certified Personnel Teaching Three or More Hours Per Day)
1958-59

STATE OF ARKANSAS
COUNTY OF PULASKI

Classification_____
School_____

*This contract and agreement between The Little Rock Private School Corporation, Pulaski County, Arkansas, and*_____ *a legally qualified teacher.*

WITNESSETH:

The Corporation, by a majority vote at a legally held meeting on September 29, 1958, offers to employ_____to teach in The Little Rock Private School Corporation for a term of nine months and one day beginning on *September 30, 1958*, and ending *June 19th, 1959*.

The salary to be paid the employee for the period of employment is $_____.

It is agreed that if the revenues of the Corporation be increased or decreased beyond the amount anticipated at the time this contract is made, the terms herein stated shall be revised in accordance with provisions of law that govern other school facilities of the state.

Pay dates shall be as follows:

October 27	20 days
November 24	20 days
December 23	21 days
January 16	10 days
January 29	10 days
February 27	20 days
March 27	20 days
April 24	20 days
May 22	20 days
June 19	20 days

Holidays with full pay are to be observed in

accordance with the laws of Arkansas and the established policies of the Corporation.

Both parties hereto agree that all steps taken under the terms of this contract shall be in accordance with all laws and regulations governing the employment and compensation of teachers, and the conduct of said teacher during the effective period of the contract.

The teacher shall file in the office of the Superintendent of The Little Rock Private School Corporation an official transcript of college training, an acceptable proof of date of birth, and shall register a valid teaching license of highest grade attainable with college credits, unless heretofore filed with his or her immediate prior employer.

All school employees shall present annually, to the superintendent's office, a certificate, from a regularly licensed physician, showing condition of physical and mental health, as required by the laws of Arkansas, and by the rules and regulations of the State Board of Health.

All teachers who have been residents of Arkansas for one year must present a poll tax receipt before drawing their salaries.

If the schools are dismissed for any reason over which the Corporation has no control, the teacher agrees to make up, without pay, such part of the time as the Corporation deems necessary.

The teacher agrees that the Corporation, as the employing agency, is authorized to make such deductions from the salary specified herein as may be required by Law for Teacher Retirement and taxes to the Government of the United States.

Both parties hereto agree that this contract may be cancelled by mutual consent upon written notice by either party duly presented at least 30 days before the effective date of such cancellation.

This offer terminates if not accepted by returning two signed copies to The Little Rock Private School Corporation, 14th and Park Streets, Little Rock, Arkansas, within one (1) day of the date shown in the next paragraph.

Signed this 29th day of September, 1958

THE LITTLE ROCK PRIVATE SCHOOL CORPORATION OF LITTLE ROCK

By s/T. J. Raney, President.

Accepted this_____day of_____, 1958

By_____

Secretary

_____

Teacher

* * *

RELEASE AND CONTRACT

STATE OF ARKANSAS
COUNTY OF PULASKI

I, _____, hereby tender my resignation to the Little Rock School District, saving any and all rights and privileges as authorized by Act 4 of the Second Special Extraordinary Session of the 61st General Assembly, and the Little Rock School District, acting in accordance with resolution adopted on the 29th day of September, 1958, hereby signifies its acceptance of same by endorsement hereon, and the said Little Rock School District further agrees that should The Little Rock Private School Corporation be dissolved or discontinue the operation of any and/or all of the schools leased from the Little Rock School District, then said Little Rock School District hereby agrees to reinstate_____to his or her previous status including salary and classification on the day immediately following his or her termination with The Little Rock Private School Corporation.

This agreement between_____ and the Little Rock School District is made in consideration of the mutual promises herein enumerated.

Signed this 29th day of September, 1958.

BOARD OF DIRECTORS
SCHOOL DISTRICT OF LITTLE ROCK

By_____

President

By_____

Secretary

_____

Employee

Executed this 29th day of September, 1958

* * *

U.S. Court of Appeals Orders Restraining School Transfer

Later the same day, the United States Court of Appeals granted a request by the plaintiffs and issued an order restraining the school board and school officials from taking any further action to transfer possession, control or operation of the school properties until October 6, when a hearing was scheduled.

TEMPORARY RESTRAINING ORDER

This cause having been heard on the application of appellants for a temporary restraining order to preserve, insofar as their integrated status is concerned, the operation of the senior high schools of the Little Rock School District, pending hearing and disposition of appellant's motion for an injunction pending appeal; and it appearing that appellees will, unless restrained, immediately transfer possession, control, and operation of the senior high schools of the Little Rock School District to a private corporation for operation as schools on a segregated basis and thereby impair the effectiveness of this court's jurisdiction over the pending appeal; and it appearing that appellees have already executed a lease of the senior high school properties to a private corporation and contemplate delivering possession of such properties to said private corporation on the morning of September 30, 1958, so that time does not permit the giving of the notice prescribed by this court's rules;

NOW, THEREFORE, IT IS HEREBY ORDERED that appellees William G. Cooper, Harold Engstrom, Wayne Upton, Dale Alford, R. A. Lile, and Virgil T. Blossom, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, are hereby restrained from taking any further action to transfer possession, control, or operation, directly or indirectly, of the senior high schools of the Little Rock School District, or from in any way further altering the status quo of such senior high schools insofar as their integrated status is concerned, existing at the time of the issuance of the Order of the District Court of September 25, 1958, which is the subject of the present appeal.

This Order shall be effective until the hearing and disposition of appellant's motion for a writ of injunction pending appeal, which hearing is set before the Court at the United States Court House and Custom House, St. Louis, Missouri, at 10 o'clock a.m. Monday, October 6, 1958.

Appellants shall give a surety bond in the amount of $1,000.00 as security for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

JOSEPH W. WOODROUGH
United States Circuit Judge

Issued at 4:10 p.m.
September 29, 1958.

* * *

On October 6, after a hearing, the Court of Appeals continued its restraining order pending another hearing October 15, 1958.

October 6, 1958

This cause came on for hearing before the Court, on this 6th day of October, 1958, on the Motion of Appellants, joined in by the United States as Amicus Curiae, for a preliminary injunction, to continue in effect, until the disposition of the case on its merits, the terms and prohibitions of the temporary restraining order herein, issued at chambers on September 29, 1958.

The matter was regularly submitted on the filings, showings, briefs and arguments of the appellants, the United States as Amicus Curiae, and the appellees, all of whom duly appeared by counsel.

On consideration of the entire situation, the Court finds, concludes and makes order as follows:

(1) In the interest of all the parties involved and of the public generally, it is desirable to have the case disposed of on its merits as promptly as possible, and to this end the matter is so set for hearing

before the Court, at St. Louis, Missouri, on Wednesday, October 15, 1958, at 10 o'clock a.m. Leave is granted to proceed on typewritten record and typewritten briefs, all parties to have until October 14, 1958, to make filing of their respective briefs.

(2) To protect the status quo, as heretofore preserved by the temporary restraining order herein; to enable the judgment of this Court to have effectiveness in case the order of the District Court appealed from should be reversed; and to prevent irreparable injury to the integration rights of appellants, of which they had previously come into present enjoyment—all of the findings, recitations and prohibitions of the temporary restraining order of September 29, 1958, are, on the showing before, us, confirmed and adopted by the Court, and, as the simplest and most effective way of continuing the necessary protection to appellants until the hearing of the case on its merits, said temporary restraining order is hereby renewed and extended to and including October 15, 1958, in all its terms and prohibitions, and on the bond previously filed in connection therewith, and as against appellees, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them.

All of the foregoing is hereby duly ordered.

* * *

After the October 15 hearing, the Court of Appeals took the case under advisement and entered an order of "preliminary or interlocutory injunction" continuing the restraint against transfer of the property until the matter is finally adjudicated.

ORDER OF PRELIMINARY OR INTERLOCUTORY INJUNCTION

A temporary restraining order was heretofore issued herein at chambers, on September 29, 1958, and such order was on October 6, 1958, renewed and extended by the Court to and including October 15, 1958.

Hearing upon the question of a preliminary or interlocutory injunction also was had before the Court on October 6, 1958, and that matter was duly submitted and taken under advisement.

The Court further, on October 6, 1958, set the case generally for hearing on its merits on October 15, 1958, and the case has now been duly presented by all the parties and taken under advisement by the Court.

From the showing made on the hearing on a preliminary or interlocutory injunction, the Court finds that appellants are entitled to have continued the restraints and prohibitions imposed by the temporary restraining order of September 29, 1958, and the extension made thereof, under date of October 6, 1958, to October 15, 1958; that such restraints and prohibitions are necessary to enable the judgment of this Court to have unimpaired operativeness and practical effect in case the order of the District Court appealed from herein should be reversed; that the maintaining of such a status of operativeness and effect is necessary to prevent irreparable injury to the educational integration rights of appellants and of others similarly situated, as set forth in the next following paragraph hereof; and that a preliminary or interlocutory injunction is entitled and necessary to be issued for such purpose, in retention of the existing status quo.

The irreparable injury, which it appears with probable certainty will be occasioned to appellants, unless a preliminary or interlocutory injunction is issued and the prohibitions of the temporary restraining order thereby continued, are that appellees will turn over to a private corporation the senior high schools of the Little Rock School District and the facilities thereof for apparent operation as segregated schools; that such segregated high schools are intended public-wise to serve the purpose and to take the place of the previous high school operations of the Little Rock School District, for the purpose apparently of nullifying the racial integration which has up to this point been achieved therein, as well as to avoid the further progress thereof; that such operations have been intended to be carried on by the private corporation under allocation to it of public funds, the same as if it constituted a regular public school; that the apparent effect of this is to make available, through the use of public school facilities and state school funds, segregated high schools for white students of the Little Rock School District and to make unavailable to appellants and the other negro students of said School District desegregated high school facilities; and that the

consequence further is to deprive appellants of the opportunity to enjoy integrated educational facilities, as previously existing, and to substitute therefor, under the use of public monies, only segregated high school facilities.

NOW, THEREFORE, IT IS HEREBY ORDERED that appellees, William G. Cooper, Harold Engstrom, Wayne Upton, Dale Alford, R. A. Lile, and Virgil T. Blossom, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them are hereby enjoined, until the further order of the Court, from taking any further action to transfer possession, control, or operation, directly or indirectly, of the Senior High Schools of the Little Rock School District, or from in any way further altering the status quo of such Senior High Schools, insofar as their integrated status is concerned, existing at the time of the issuance of the order of the District Court of September 25, 1958, which is the subject of the present appeal.

IT IS FURTHER ORDERED that this preliminary or interlocutory injunction shall have as its security, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, the surety company bond heretofore filed herein in connection with the temporary restraining order, said bond having duly provided that "This bond shall stand as security for any subsequent order or modification of said order as may subsequently be made by the Court."

October 15, 1958

EDUCATION
Public Schools—Arkansas

Thomas Leroy BANKS et al. v. J. J. IZZARD, as President, etc. Board of Trustees, VAN BUREN INDEPENDENT SCHOOL DISTRICT, et al.

United States District Court, Western District, Arkansas, Fort Smith Division, September 19, 1958, Civil Action No. 1449.

SUMMARY: Negro school children in Van Buren, Arkansas, in 1955 brought suit in federal district court against city public school officials, seeking admission to public school without regard to race or color. After a hearing on defendant's motion for a continuance, the court issued in January, 1956, an interlocutory order requiring defendants to make a "prompt and reasonable start" toward desegregation of the schools and to report the progress made. 1 Race Rel. L. Rep. 229 (1956). In August, 1956, defendant Board made a report setting forth a plan of integration to commence with the high school and to integrate one additional grade a year in inverse order. 1 Race Rel. L. Rep. 860 (1956). On August 8, 1957, the Board filed a progress report indicating that the start of integration would be made with the September, 1957, school term in the high school. 2 Race Rel. L. Rep. 965 (1957). This plan was approved on September 21, 1957, by the court, which then, with plaintiff's approval, dismissed plaintiffs' petition. During the 1957-58 school year, some twenty-five Negroes attended previously-white Van Buren School. On September 10, 1958, plaintiffs instituted a new class action in the Arkansas federal district court seeking mandatory injunctive relief "to compel defendants to go forward with the execution and enforcement" of the plan. Plaintiffs alleged that beginning with the September, 1958, term defendants without justification abandoned the plan; that white students (known to defendants) had conspired to make lawless demonstrations of mob force and violence, compelling plaintiffs to withdraw from school to the safety of their homes; that defendants had failed to exercise their authority to restrain and punish the students involved; that such non-action had made defendants parties to the action which coerced plaintiffs to leave school —all because of their race and in denial of their civil rights and equal rights under the Constitution and laws of the United States. The response of defendants was generally that plaintiffs had not been denied or threatened with denial of their civil rights, and that there had

been no conspiracy among persons under their control. Defendants stated rather that they had in good faith sought to implement the integration plan from the time of its approval. The Court found that defendants had attempted in good faith to comply with the integration plan and were not guilty of any of the acts complained of by plaintiffs. The mandatory injunction prayed for was therefore denied, but the court retained jurisdiction of the case to enter other orders as might become necessary. The complaint, response, and court order are set out below.

Complaint

I.
JURISDICTION

(a). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331, this being an action that arises under the Constitution and laws of the United States wherein the matters in controversy exceed the sum of $3,000.00, exclusive of interest and costs, and Title 42 USCA., Sections 1981, 1983 and 1985, this being an action in which citizens of the United States contend that they have been, are now, and are threatened in the future with a denial of their civil rights and of equal rights under the Constitution and laws of the United States and that they are now being and that they are threatened with a future denial of the equal protection of laws as provided by the Constitution and laws of the United States, viz., Section 2, of the Fourteenth Amendment to the said Constitution.

(b). The jurisdiction of this Court is further invoked under Title 28, USCA., Section 1343(3), this being an action for redress of the deprivation under color of law, of rights, privileges and immunities secured to plaintiffs as citizens of the United States by the Constitution and laws thereof.

II.
INJUNCTIVE RELIEF

The jurisdiction of the Court is invoked under Title 28 USCA., Section 2281, and pursuant to the provisions of Rule 65, FRCP, this being an action for mandatory injunctive relief including a temporary restraining order and final permanent relief to compel the defendants to abide by the terms and provisions of a plan to integrate the public schools under their supervision and control, which plan was approved by this Court, as will be shown more fully hereinafter, and to compel defendants to go forward with the execution and enforcement of the provisions of said plan as they are required by law to do.

III.
FACTS

1. Plaintiffs allege that they are, each of them, minors; that they are citizens of the United States and of the State of Arkansas; that they live and reside in Crawford County, Arkansas, and within the limits of the jurisdiction of this Court; that they are, each of them, members of the Negro race as defined by the laws of the State of Arkansas, (Title 41, Section 808, ASA, 1947), and that they bring this action by their respective next friends pursuant to Rule 17(c), FRCP.

2. Plaintiffs allege that they bring this action in their individual behalf and on behalf of each other, and on behalf of all other Negro minors who live within the Van Buren Independent School District who are similarly situated because of their race and color; that they are each of them members of a general class of persons who are being unlawfully discriminated against by the defendants, because of the race and color of your petitioners and the class of persons that they represent who are similarly situated as aforesaid; that the members of the class are numerous, so numerous indeed, as to make it impracticable to bring all of them before the Court at this time; that your petitioners can and will fairly and adequately represent all of the members of the said class; that the character of the right sought to be protected is several and that there is a common question of law and fact affecting the rights of all of them and a common relief is sought; that they bring the action as a class action pursuant to Rule 23(a-3), FRCP.

3. Plaintiffs allege that the defendant Van Buren Independent School District is a body

corporate with powers to sue and to be sued, (Title 80, Sec. 402, ASA, 1947), and that it is sued here in its corporate capacity. Service is to be made upon the said corporation by serving its president, J. J. Izzard.

4. Plaintiffs allege that the defendant Van Buren Independent School District is a political subdivision of the State of Arkansas; that it is an administrative agency of the state, and it functions under the general laws of the State, (Title 80, Sec. 401, ASA, 1947).

5. Plaintiffs allege that the defendant J. J. Izzard is the duly elected, qualified and acting president of the board of trustees of the said independent school district and that the defendant Everett Kelley is the duly selected, appointed and acting executive officer of the said board; that they are each of them agents of the said board and agents of the State of Arkansas; that they hold their respective offices and discharge duties and perform functions in the name of the state pursuant to its general education laws, and that they are each of them sued in their respective official capacities.

6. Plaintiffs allege that the defendants named in paragraph 5, above are each of them citizens of the State of Arkansas and of the United States; that they live and reside in Crawford County, Arkansas, and within the limits of the jurisdiction of this Court and are subject to the jurisdiction of said Court.

7. Plaintiffs allege that heretofore on towit: the 29th day of October, 1955, an action was filed and docketed in the records of this Court styled Thomas Leroy Banks, Et Al. v. J. J. Izzard, as President, Board of Trustees, Van Buren Independent School District, a Corporation Et Al., Civil Action #1236, to which some of the plaintiffs herein were parties and the plaintiffs herein who were not named as parties in that said suit belong to the class of persons represented in that said suit because they are Negro persons who live in the defendant school district who are similarly situated because of race and color as plaintiffs therein; that the said action was filed for the purpose of securing for the petitioners therein and the members of the class represented by them who are similarly situated as aforesaid because of race and color, the right and privilege of attending the public schools in the defendant school district on a racially non-segregated basis, and that the Complaint filed therein is incorporated herein and made a part hereof and all pleadings and judgments and orders in said action are incorporated herein and made a part hereof, as though copied herein word for word, sentence for sentence and page for page.

8. That defendants filed their answer therein by which they admit the jurisdiction of the Court and its authority to grant injunctive relief therein; that defendants admitted that the decisions of the Supreme Court of the United States in the case of Brown et al. vs. Board of Education of Topeka, et al., decided by the said Court May 17, 1954, announced principles by which the Statutes of the State of Arkansas permitting segregation in its public schools will be declared unconstitutional; that notwithstanding that the said statutes have not yet been declared unconstitutional by a Court of competent jurisdiction, these defendants have given due regard and consideration to the supplemental decision rendered on May 31, 1955, implementing the said decision; that in consideration of this * * * these defendants have been and are now endeavoring to cope with the problems incident to such transition and defendants prayed that plaintiffs' Complaint be dismissed.

9. That the matter came on for trial before this Court on the 17th day of February, 1956, without jury, and the Court having heard the testimony, then and there made and entered an order, the terms of which were:

> IT IS THEREFORE ORDERED AND ADJUDGED that the defendants and their successors in office shall make a prompt and reasonable start towards the effectuation of the transition to a racially non-discriminatory school system as required by the ruling of the Supreme Court of the United States by its order of May 17, 1954; that the defendants and their successors in office report to this Court not later than August 15, 1956, on the progress that has been made and the plan that they have to effectuate the transition from the present system to a racially non-segregated school system.

The Court then continued the case, and defendants filed their progress report on the 20th day of August after having first sought and received the Court's approval of the date of filing said report.

10. The report stated in part that:

"Pursuant to the order and direction of this Court and on August 20, 1956, defendants filed a progress report and plan of integration in which there was outlined the problems attendant upon complying with the directions to effectuate such transition. The defendants, after due consideration and study of the problems, proposed as the most feasible method of complying with the Court's order to accomplish integration, first enrolling children in the ninth, tenth, eleventh and twelfth grades on a racially non-discriminatory basis, and in the succeeding year commence the integration on the grades, beginning with the eighth and in inverse order integrating one grade each year, thus accomplishing full integration within a period of nine years from the inception of the plan * * *."

11. The report established September, 1957, as the year in which the execution of the plan would begin. The Court approved the said plan on the 21st day of September, 1957, and dismissed plaintiffs' petition as prayed by defendants in their answer. Defendants having commenced the application of their plan, plaintiffs acting in reliance upon the good faith performance of the plan of defendants approved the order entered by the Court.

12. Plaintiffs come now to suggest to the Court and show that beginning with the September, 1958 term and after a full year of successful and satisfactory performance under the plan, defendants have wilfully and without justifiable cause abandoned the said plan and that the second phase of the plan which calls for the integration of the eighth grade was entered upon and later abandoned by defendants even though this phase of the plan has met with no overt opposition, and that plaintiffs have petitioned the said board of trustees to repent and return to the enforcement and execution of the said plan, but that notwithstanding plaintiffs' appeal and petition to the said board, defendants are now failing and refusing to execute and enforce the said plan and that they threaten to continue to fail and refuse to execute and enforce the said plan unless and until defendants are directed and ordered by this Court to execute and enforce the said plan according to its terms and tenor; that the said failure and refusal on the part of defendants have caused, is now causing and will in the future cause plaintiffs and members of the class of persons that they represent as aforesaid great and irreparable harm and injury and they have no plain, adequate or efficient remedy at law.

13. Plaintiffs allege that some forty or more students of the high and junior high schools operated by defendants, all of whom are unknown to plaintiffs but well known to defendants, and all of whom are under the direct supervision and control of defendants and subject to the disciplinary rules and regulations of defendants have met together and conspired to act in concert to create disorder and to make lawless demonstrations of force of violence in, upon and around the buildings and grounds of said public schools; that the said students have met together and they have acted in concert and they have created disorder and made lawless demonstrations of force and violence in, upon and around the buildings and grounds of the said schools and that they have threatened plaintiffs with force of violence and they have actually committed such acts of violence against plaintiffs and the members of their families and thereby made attendance at the said public schools by plaintiffs so unsafe, so dangerous and so charged with an atmosphere of violence and bodily harm that plaintiffs have been compelled to retreat from school attendance and return to the safety and security of their respective homes and remain there without the benefit of any public education provided for them by defendants; that there are no other high or junior high schools in the said district at which plaintiffs and the members of the class of persons that they represent as aforesaid can attend and receive public education and that plaintiffs and the members of the class that they represent as aforesaid have suffered, are now suffering and will in the future suffer great and irreparable harm and injury unless relief is granted them by this Court and plaintiffs have no plain, efficient or adequate remedy at law.

14. Plaintiffs allege that the lawless mob of white students who have bound themselves together and conspired to act in concert to create disorder and to make demonstrations of force and violence in, upon and around the public schools operated by defendants as aforesaid, have while acting together done violence and bodily harm to plaintiffs and the members of the class of persons that they represent who are

similarly situated because of race and color; that notwithstanding defendants' authority and power to restrain, discipline and punish the said white students to prevent them from doing harm and injury to plaintiffs and others and depriving them of their civil rights defendants have shown utter indifference to the presence of the mob and have made no known effort to curb or restrain the action of the said mob; that the recalcitrant behavior of defendants in failing and refusing to exercise their authority to disperse and dissipate the violent action of the said mob has been such as to identify defendants with the mob and make them parties to it and co-conspirators with the students who have brought on the unrest and disorder that occasioned plaintiffs' withdrawal from the said schools; that defendants have left the said lawless mob free and unrestrained and the mob has created a virtual reign of terror, in, at and about the buildings and grounds of the said schools for the purpose of intimidating plaintiffs and coercing them to leave school all because of the race and color of plaintiffs and plaintiffs have suffered great and irreparable harm and injury as a result of the action of the said mob and because of the non-action of defendants and plaintiffs have no plain, adequate or efficient remedy at law.

WHEREFORE, the premises considered, plaintiffs pray that this cause be advanced on the docket of this Court and that the defendants be served with citation directing them to appear and show cause on a day certain, if any they have, why they should not be directed by the Court to proceed with the execution and enforcement of the plan previously approved by this Court to integrate the public schools under their supervision and control according to law.

That upon such hearing a mandatory preliminary restraining order issue from this Court directing and commanding defendants and each of them to proceed with the execution and enforcement of the said plan as approved by this Court on the 21st day of September, 1956.

That upon final hearing hereof the Court issue a permanent mandatory injunction directing and commanding the defendants J. J. Izzard and Everett Kelley and the defendant Van Buren Independent School District a corporation, its officers and members, their servants, employees, their agents and attorneys, and all others in concert or participation with them to proceed with the execution and enforcement of the plan of integration submitted to the Court on the 20th day of August, 1956, and approved by the Court on the 21st day of September, 1956.

Plaintiffs pray for such other orders and processes, including their costs incurred herein, as may appear equitable and just to the Court, and that the Court retain jurisdiction of this cause to provide plaintiffs an opportunity to seek further relief herein provided defendants fail and refuse to obey the order and command of the Court.

Wiley A. Branton
Thurgood Marshall
U. Simpson Tate

Response to Application By School Board

Come the defendants, J. J. Izzard, as President and Everett Kelley, as Superintendent, Van Buren Independent School, a corporation, and The Van Buren Independent School District, a corporation, and responding to the application contained in the complaint filed herein by the plaintiffs for a mandatory preliminary restraining order state:

I.

These defendants deny that the plaintiffs, or either of them, have been, are now, or are threatened in the future with a denial of their civil rights and equal rights under the Constitution and laws of the United States, or that they are now being or that they are now threatened with the future denial of the equal protection of laws as provided by the Constitution and laws of the United States as alleged in paragraph I of the complaint herein by and on account of any act of these defendants, or any of them.

II.

Responding to the allegations of the complaint for mandatory injunctive relief, these defendants specifically deny that the plaintiffs, or any of them, are entitled to mandatory injunctive relief, including a temporary restrain-

ing order, as alleged in paragraph II of the complaint.

III.

These defendants, and each of them, specifically deny that they, or any of them, by any act have or threatened to unlawfully discriminate against any of the plaintiffs.

IV.

The defendants state that it is true that in a suit heretofore filed in this court on October 29, 1955, by Thomas Leroy Banks and others against these defendants, Civil No. 1236, these defendants were ordered and directed to implement the integration of the Van Buren School System, and were ordered and directed to file a plan of transition from a racially segregated school system to a racially non-segregated school system, and that pursuant to the orders and directions of the court in said cause such plan of integration was filed. That thereafter said plan was approved by the court and the relief sought in the petition in said cause was denied because of the compliance with the orders and directions of the court by the defendants.

V.

That these defendants have consistently and in good faith sought the implementation of the plan of integration as they were required to do, and specifically deny that they are now failing and refusing, or that they have ever failed and refused, to execute and enforce said plan; specifically deny that they threatened to fail and refuse and enforce said plan. To the contrary, these defendants state that they have conscientiously pursued a course of implementation of said plan in accordance with its terms.

VI.

The defendants state that there have been no acts of force, threats or violence in and upon the buildings and grounds of the defendant school district; that they deny that any persons under their direct supervision and control and subject to the disciplinary rules and regulations of the defendant, while under such control and supervision, have met together and conspired to act in consert to create disorder in and upon the buildings and grounds of the defendant district, to the knowledge of these defendants. These defendants deny that they have shown any indifference to the presence of any disturbing elements; deny that they have approved or permitted by inaction any acts of violence, any disorder, any demonstrations on the part of the persons whatsoever in and upon the public school grounds operated by these defendants, but state the truth to be that in fact they have at all times sought to maintain order and discipline on the school premises over which they had control for the benefit of all of the students in said schools, including the plaintiffs.

VII.

These defendants specifically deny that through any act of theirs whatsoever that the plaintiffs, or any of them, have suffered any harm and injury, and specifically deny that the facts and conditions warrant or that the plaintiffs are entitled to a mandatory temporary injunction.

WHEREFORE, premises considered, these defendants pray that the prayer of the plaintiffs, as contained in their complaint for a mandatory preliminary restraining order, be denied.

RALPH W. ROBINSON
SHAW, JONES & SHAW

Order

MILLER, District Judge

On this September 19, 1958, the above-entitled cause came on for hearing upon notice by the plaintiffs to defendants of application for a preliminary mandatory injunction, the plaintiffs appearing by Messrs. U. Simpson Tate and Wiley A. Branton, their attorneys, and the defendants appearing by Messrs. Bruce H. Shaw and Ralph W. Robinson, their attorneys.

Whereupon, the parties stated that they were ready to submit the cause upon its merits and it was agreed in open court by counsel that the case be tried and considered upon its merits upon the question of a mandatory injunction against defendants, and that defendants' response as filed herein this day be considered as their answer to the complaint.

Counsel for plaintiffs stated in open court

that plaintiff George Hudgins has enrolled in another school and that the complaint as to him and Otis Washington as his Next Friend should be dismissed.

Evidence on behalf of the respective parties is presented, and upon consideration thereof, together with the oral arguments of counsel, and the pleadings in the case, the court finds:

(1) That the defendants have acted and are now acting in utmost good faith in an effort to fully comply with the plan of integration filed in Civil Action No. 1236 heretofore pending in this court and that the issuance of a mandatory injunction against the defendants is not necessary or justified by the evidence:

(2) That none of the defendants are guilty of the acts complained of herein, but that other persons not parties hereto may have committed acts in an effort to thwart the execution of the plan hereinbefore referred to, and that the public interest is such that the complaint should not be dismissed and that the court should retain jurisdiction to enter such other and further orders as may be necessary.

Therefore, it is considered, ordered and adjudged that the mandatory injunction as prayed be and it is hereby denied, and jurisdiction of the case is retained for the entry of such other and further orders that may be necessary upon proper application of any of the plaintiffs or defendants.

It is further ordered that the complaint as to the plaintiff George Hudgins and Otis Washington as his Next Friend be and the same is hereby dismissed.

EDUCATION
Public Schools—Delaware

Brenda EVANS, an infant, by Charles Evans, her guardian *ad litem*, et al. v. Madeline BUCHANAN, et al. Members of the State Board of Education, and George R. Miller, Jr., State Superintendent of Public Instruction, et al.
Madeline STATEN et al. v. Madeline BUCHANAN et al.
Julie COVERDALE et al. v. Madeline BUCHANAN et al.
Eyvonne HOLLOMAN et al. v. Madeline BUCHANAN et al.
David CREIGHTON et al. v. Madeline BUCHANAN et al.
Marvin DENSON et al. v. Madeline BUCHANAN et al.
Thomas J. OLIVER, Jr., et al. v. Madeline BUCHANAN et al.

United States Court of Appeals, Third Circuit, May 28, 1958, 256 F.2d 688.

SUMMARY: Eight class actions were filed in federal district court in Delaware by Negro school children against members of the State Board of Education and various county and local school officials. In each case admission was sought to public schools in the state without discrimination on the basis of race or color. One case, involving Clayton School District No. 119 [*Evans v. Buchanan*], was prosecuted while the others were held in abeyance. In that case the local school officials moved to dismiss the action as to them on the ground that the complaint failed to state a valid cause of action because it did not allege the absence of administrative impediments to the desegregation of the schools. The court reviewed the two decisions of the United States Supreme Court in the *School Segregation Cases* and stated that administrative impediments to the opening of public schools on a nondiscriminatory basis were not matters to be alleged by persons seeking admission but, on the contrary, were matters of mitigation which might be shown by school officials in indicating their good faith compliance with the constitutional mandate of the Supreme Court. The motion to dismiss was denied. 145 F.Supp. 873, 2 Race Rel. L. Rep. 7 (1956). Thereafter the plaintiffs moved for a summary judgment. In granting that motion the court reviewed the efforts of the State Board of Education, one of the defendants, to require the local board to present a plan for desegregation of the schools. The court stated that although the state board was ap-

parently acting in good faith the local board had made no move toward such action. The court directed the local board to present to the state board, within thirty days, a plan for integration and directed the state board to submit its plan to the court within sixty days. 149 F.Supp. 376, 2 Race Rel. L. Rep. 301 (1957). The plaintiffs in seven of the cases then moved to consolidate those cases and for summary judgments. The court granted the motions. In its order the court directed the non-discriminatory admission of children to the specific schools named in the suits to be accomplished by the fall, 1957, school term. It also directed the State Board of Education to submit, by September 13, 1957, a plan for the desegregation of all schools in the state to be accomplished by the fall, 1957, term. (2 Race Rel. L. Rep. 781.) On appeal, the State Superintendent of Public Instruction and the members of the State Board of Education contended that they were without power to carry out effectively the decree of the district court, because the two powers necessary to planning and effecting segregation—(1) admission of individual students to one school rather than to another, and (2) employment and assignment of teachers and principals to schools—were vested by state statutes solely in the local district school boards, the personnel of which are elected by voters of the districts and are beyond the authority of those appellants to appoint or remove. Therefore, they maintained, the failure of the court below to enjoin the respective local school boards left these appellants powerless to comply with the court order and in danger of contempt of court. Rejecting such arguments, the Court of Appeals for the Third Circuit pointed to a statutory requirement that the State Board maintain a "uniform, equal and effective system of public schools throughout the State." The court would not assume non-adherence by local school board members to regulations concerning non-discriminatory racial practices if such were issued to them by the state board under the cited mandate. At any rate, the appeals court said, the state board and superintendent were not required by the decree below to guarantee that desegregation would be accomplished throughout the state school system, but to submit plans toward the end. The dates by which such laws were to be submitted having become inoperative, that portion of the decree was vacated to permit the district court to set new dates; and, so modified, the decree was affirmed.

BIGGS, Chief Judge.

The appeals at bar arise out of seven cases in the court below relating to the same subject matter and may be disposed of appropriately in one opinion. The jurisdiction of the court below was invoked under Section 1331, federal question and jurisdictional amount, under Section 1343, Civil Rights, Title 28 U.S.C. and under Section 1983, Title 42 U.S.C., and under the Fourteenth Amendment to the Constitution of the United States. No issue as to jurisdiction is presented.

The histories of these litigations are set out in some detail in the opinions of the court below, referred to from time to time hereinafter, and need not be repeated here.[1] It is sufficient to state that following the decisions of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Delaware State Board of Education requested the local school district boards to submit plans for the admission and education of Negro children into the public schools of the respective school districts on a racially non-discriminatory basis. There was prompt compliance by many school districts in Delaware but the local school district boards in Kent and Sussex Counties in general did not comply with the directions of the State Board of Education. Thereafter the minor plaintiffs, children residing within seven school districts, by guardians *ad litem*, brought the seven suits in the court below to compel compliance with the rulings of the Supreme Court of the United States in the Brown case.

[*All Class Actions*]

All of the complaints allege that the minor plaintiffs are children resident within their respective school board districts and are entitled immediately to admission to the schools of their districts and would be accepted as students therein except for their race, color and ancestry. The seven suits are class actions brought on

1. See also the opinion of the Supreme Court of Delaware in Steiner v. Simmons, 1955, Del., 111 A.2d 574.

behalf of all children similarly situated to the minor plaintiffs, pursuant to Rule 23(a) (3) Fed.R.Civ.Proc., 28 U.S.C.[2]

The defendants are members of the State Board of Education, the State Superintendent of Public Instruction and members of local school boards. The relief sought by the complaints was that the court below grant interlocutory and permanent injunctions declaring that the administrative orders, regulations and rules, practices or usages, pursuant to which the minor plaintiffs are segregated with respect to their schooling because of race, color or ancestry, violate the Fourteenth Amendment to the Constitution of the United States, and that the court below issue interlocutory and permanent injunctions requiring the defendants to admit the minor plaintiffs and all other children similarly situated to the public schools of their respective school districts on a racially non-discriminatory basis.

[*Power Challenged*]

The appellants, who are members of the State Board of Education and the State Superintendent of Public Instruction, filed joint answers in all seven cases asserting that the power to effect desegregation lies not in them but in the local school boards. The members of the boards of education of the school districts also filed joint answers. These answers are substantially the same and, briefly put, assert that the local boards do not possess the power or jurisdiction under the school laws of Delaware, or the available facilities, to effect the admission of the minor plaintiffs or other children similarly situated to the respective schools on a racially non-discriminatory basis.

The members of the Board of Trustees of Clayton School District No. 119, at C.A. No. 1816 in the court below, No. 12,375 in this court, answered also that they were "improper parties" to the action. The court below correctly held this contention invalid. D.C.Del. 1957, 149 F.Supp. 376.

On January 21, 1957 the plaintiffs in the case involving the Clayton School District mentioned immediately above filed a motion for summary judgment pursuant to Rule 56(a), Fed.R.Civ. Proc., 28 U.S.C.[3] After argument, the court below on March 6, 1957, filed an opinion, 149 F.Supp. 376, holding that the members of the Board of Trustees of Clayton School District No. 119 were making no reasonable start toward the admissions of the minor plaintiffs and those similarly situated on a racially non-discriminatory basis. Following this opinion, on April 1, 1957, the court entered a decree enjoining members of the Board of Trustees of the Clayton School District "in accordance with further order" from refusing admission to children on account of race, color or ancestry and requiring the members of the Board of Trustees of the Clayton School District to submit to the State Board of Education, within 30 days, a plan for the admittance to, and the enrollment and education in the public school maintained by the Board of the minor plaintiffs and all other children on a racially non-discriminatory basis, and also requiring the members of the State Board of Education within 60 days to file a plan so providing with the court below.

[*Appeal Not Prosecuted*]

An appeal from this decree was taken to this court but was not prosecuted and accordingly the record was returned to the court below. The decree of April 1, 1957 is presently outstanding. No other similar decree addressed to members of the local school boards was entered in the other six cases but it is in this respect only that the case involving Clayton School District No. 119 differs in substance from the other six cases involving the other local school boards. However, in view of the fact that the operation of the decree in the Clayton case was made contingent on a further order of the court below we are justified in

2. "Rule 23 * * * (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * * * *

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

In respect to the right of the plaintiffs to maintain a class action, see Evans v. Members of State Board of Education, D.C.Del.1956, 145 F.Supp. 873.

3. Rule 56(a) is as follows: "For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

treating and will treat this case as *in pari passu* with the other six cases.

On June 21, 1957, the plaintiffs in six of the seven cases, the case at No. 1816 in the court below involving Clayton School District No. 119 being excluded, moved for summary judgment against the members of the State Board of Education and the State Superintendent of Public Instruction. It should be noted that the defendants who are members of the local school boards were not included in these motions. On June 25, 1957, the plaintiffs in the six cases last referred to, the case at No. 1816 in the court below being excluded, moved to consolidate the six cases.

On July 25, 1957, the court below handed down an opinion, 152 F.Supp. 886, granting the motion to consolidate the six cases and the motions for summary judgment against the members of the State Board of Education and the State Superintendent of Public Instruction. The court below went further, however, and, apparently *sua sponte*, since no applicable like motions had been filed for summary judgment and for consolidation in respect to the suit at No. 1816 in the court below involving the Clayton School District No. 119, also granted summary judgment in that case against the members of the State Board of Education and the State Superintendent of Public Instruction and consolidated that case with the other six actions. The decree of the court below was an appropriate and proper one, and furnishes us with an additional reason for treating the appeal involving the Clayton School District No. 119 on a parity with the other six cases. The decree entered in all seven cases by the court below requires that the minor plaintiffs in all seven cases and children similarly situated should be admitted to their respective school districts on a racially non-discriminatory basis by the Autumn term 1957 and enjoins the designated defendants from refusing admission to these children. It also directs the State Board of Education and the Superintendent of Public Instruction to submit a plan to the court for the admittance, enrollment and education of the children on a racially non-discriminatory basis within 60 days and to serve copies of the plan upon the members of the local school boards involved within 45 days.[4] The appeals at bar, taken by the members of the State Board of Education and the Superintendent of Public Instruction, followed.

[*Powers Held Essential*]

The State Superintendent of Public Instruction and the members of the State Board of Education assert that the exercise of two powers are essential for planning and effecting desegregation. They argue that to admit the children involved to the respective public schools involved, authority must be exercised to admit

4. The order of the courts is as follows:

"1. The motion of plaintiffs to consolidate the following causes, C.A.1816 through C.A.1822, inclusive, be and the same is hereby granted and all pending causes in this Court are hereby consolidated for judicial decision.

"2. The plaintiffs' motions for summary judgment in C.A.1816 through C.A.1822, inclusive, as against the Members of the State Board of Education and the State Superintendent of Public Instruction be and the same are hereby granted.

"3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially nondiscriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 91, Milton School District No. 8, Laurel Special School District, Seaford Special School District and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1957.

"4. In accordance therewith defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts.

"5. To further obtain and effectuate admittance, enrollment and education of said minor plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts, on a racially nondiscriminatory basis, defendant Members of the State Board of Education, having general control and supervision of the public schools of the State of Delaware and having the duty to maintain a uniform, equal and effective system of public schools throughout the State of Delaware, and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within 60 days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall Term of 1957, of pupils in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation approved by the State Board of Education.

"6. 15 days prior to the submission of said plan to this Court, defendant Members of the State Board of Education, etc., shall send in writing by registered mail a copy of the plan of desegregation herein ordered to be submitted to this Court, together with a copy of this Order, to each member of the school board in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation."

individual students to one school rather than to another and that to educate students it is necessary to possess the authority to employ and assign teachers and principals to the various schools. They assert also that the powers necessary to effect these results are vested by the pertinent Delaware statutes solely in the local district school boards. They point to the provisions of 14 Del.C. Sections 741, 944, 976, 1401 and 1410, which variously provide for the employment of teachers and principals of schools, for the fixing of their salaries and for the termination of their employment.

The appellants point also to 14 Del.C. Sections 902 and 941, providing for the establishment of Boards of Education in the local school districts [5] and specifying the duties of these boards, included among which is the determining of policies in relation to the maintaining of separate schools for white and colored children, and the settling of disputes and for property administering the public schools of the districts. The appellants also assert that they are without the authority to impose a plan for desegregation on the boards of education of the respective school districts because the members of these boards in Kent and Sussex Counties are elected by the voters of the school districts, 14 Del.C. Section 305, and that therefore they are without authority to appoint or remove these elected representatives or to control their actions in any way. In short, the appellants contend that they are without power effectively to carry out the court's decree.

[*State Authority*]

Some of the local or district school boards, employing those of Milford, Seaford, Laurel and Greenwood as examples, contend primarily that the State Board of Education possesses the power to determine the operation of the public schools and that the State Board has the authority to adopt rules and regulations for the administration of the public school system of Delaware and that these shall be binding throughout the State. 14 Del.C. Section 122. They assert also that the school laws of Delaware put the burden on the Board of Education and the State Superintendent of Public Instruction to maintain a "uniform, equal and effective" educational system in Delaware. 14 Del.C. Section 141. The plaintiffs make similar contentions but they also assert that the Supreme Court of Delaware in Steiner v. Simmons, Del. 1955, 111 A.2d 574, held that the State Board of Education has the power to regulate the public schools of Delaware, relying *inter alia* on 14 Del.C. Sections 101(a), 121 and 122. These statutory provisions place certain supervisory powers over the whole of the Delaware school system in the State Board of Education. While the parties to these suits make other and further contentions these need not be discussed in this opinion. It should be noted, however, that we have considered them.

[*Guiding Principles*]

In determining the issues presented it is necessary to start with the guiding principles enunciated by the Supreme Court in its opinions in Brown v. Board of Education of Topeka, supra. First, the Supreme Court has ruled that the Fourteenth Amendment to the Constitution of the United States prohibits the segregation of children in public schools solely on the basis of race. Second, the Court has prohibited admission to the public schools on a basis of racial discrimination. Third, the Court has required United States District Courts to enter such decrees as are necessary and proper to admit children to public schools on a racially non-discriminatory basis "with all deliberate speed."

Among the statutory duties entrusted to the State Board of Education by the General Assembly of Delaware is that of maintaining a "uniform, equal and effective system of public schools throughout the State * * *", 14 Del. C. Section 141. While this section of the Delaware Code also requires the State Board of Education, pursuant to Article 10, Section 2, of the Constitution of Delaware, Del.C.Ann., to maintain separate systems for white and Negro children, these provisions fall in view of the decisions of the Supreme Court of the United States referred to for these decisions redefined the concept of equality in public education. But while the separate but equal provisions of the Delaware Constitution and laws have been stricken down, the statutory mandate to the State Board of Education continues to exist and requires that body to maintain a uniform, equal and effective public school system in the State of Delaware. To hold otherwise would be nullification.

5. It should be noted that Section 301, 14 Del.C., defines a "district" as meaning a "School District or a Special School District or both."

The contention of the members of the State Board of Education that the mandates of that body have no force upon the local school boards and the persons who comprise them is erroneous. The time when the Delaware educational system was encompassed by a loose federation of "425 educational republics" has long since passed. 2 Reed, History of Delaware, 691. The centralized nature of the present Delaware public educational system and the powers and duties of the State Board of Education are demonstrated fully by statutes of Delaware dealing with education.[6] This contention of the members of the State Board of Education is really one to the effect that the individuals comprising the local school boards will not obey the law. We will not make such an assumption.

[*Effect of Section 122*]

We point out again that 14 Del.C. Section 122, gives the State Board of Education the power to "adopt rules and regulations for the administration of the free public school system which, when prescribed and published, shall be binding throughout the State." As if to re-emphasize the paramountcy of the State Board of Education's function in developing and maintaining a uniform school system throughout the State, Section 941, 14 Del.C., in specifying the duties and powers of the local school boards of the respective school districts, states the members of these bodies shall perform their duties and exercise their powers "subject to the provisions of [Title 14] and in accordance with the rules and regulations of the State Board of Education." In view of the foregoing we cannot doubt but that the State Board of Education was designed as and is the central administrative force in Delaware's system of public education and is not a mere powerless reviewer of actions taken by local school boards. Our ruling as to the effect of the school laws of Delaware in this respect is confirmed by the opinion of the Supreme Court of Delaware by Mr. Chief Justice Southerland in Steiner v. Simmons, supra, Del., 111 A.2d at page 580, wherein it is stated: "By the school laws of the State it [the State Board of Education] is vested with general policy-making power, and with authority to adopt rules and regulations for the administration of the public school system."

Accordingly we perceive no merit in the contention of the State Board of Public Education and of the State Superintendent of Public Instruction that the failure of the court below to subject the members of the local school boards to the injunction of July 15, 1957 places or leaves the members of the State Board of Education and the State Superintendent of Public Instruction in such a position that they stand in danger of contempt proceedings in the court below. The appellants say that they are in a position of danger because the mandate imposed upon them by the order of the court cannot be carried out by them in view of the uncooperative attitude of members of the local school boards. The appellants assert legal impotency to carry out the decree of the court unless the members of the local school boards be made subject to the injunction. If a specific order of the court below be required to compel the members of the local school boards to perform their duties under the school laws of Delaware, we may assume that the court below will enter an appropriate decree against them at an appropriate future time and also will have due regard for the actions taken by members of the State Board of Education and by the State Superintendent of Public Instruction to create a racially non-discriminatory school system in Delaware. We reiterate that we will not assume that the members of the local school boards, also named as defendants in the instant litigations, will not adhere to rules and regulations of the State Board of Education as to the non-discriminatory racial practices of such rules and regulations as are created and promulgated by the State Board of Education.

6. As follows: 14 Del.C. § 101(a). The State is vested with the "general administration and supervision of the free public schools and of the educational interests of the State."

14 Del.C. § 121. "The Board shall exercise general control and supervision over the public schools of the State, * * *."

14 Del.C. § 121(2). The State Board has the power to determine the educational policies of the State.

14 Del.C. § 121(7). The State Board shall decide "all controversies and disputes involving the administration of the public school system."

14 Del.C. § 121(10). The State Board shall have the duty of "causing * * * the provisions of this title to be carried into effect, so as to provide a uniform, equal and effective system of public schools throughout the State; * * *."

14 Del.C. 141 (a). "The Board shall maintain a uniform, equal and effective system of public schools throughout the State, and shall cause the provisions of this title, the by-laws, rules and regulations and the policies of the Board to be carried into effect."

Moreover, an analysis of the decree appealed from demonstrates that the members of the State Board of Education and the State Superintendent of Public Instruction are not required to guarantee the accomplishment of desegregation in the Delaware school system but are enjoined from refusing admission to the minor plaintiffs and other children similarly situated to the schools of their respective school districts on account of race, color or ancestry. In short, the decree of the court below was designed to relieve the appellants of passivity and to compel them to go forward with the desegregation of the Delaware schools. The first step to be taken by the State Board of Education, with the aid of the State Superintendent of Public Instruction, is to submit a plan designed to effect the principles enunciated in the decisions of the Supreme Court in Brown v. Board of Education of Topeka, supra, as ordered by the court below.

[*No Further Delay*]

The members of the State Board of Education and the State Superintendent of Public Instruction may not delay further in the formulation and submission of such a plan. They must prepare and submit it promptly. The time for hesitation is past and the time for definitive action has arrived. The law as enunciated by the Supreme Court of the United States must be obeyed by all of us. If we do otherwise we will destroy our present form of constitutional government.

The decree of the court below stated dates in 1957 by which such a plan should have been submitted by the State Board of Education. Those dates are, of course, presently inoperative. New dates must be set. This is a matter which must be left to the discretion of the trial court. Those portions of the decree stating dates for the submission of the plan by the State Board of Education to the court below and to each member of all of the school boards in all of the public school districts which heretofore have not admitted pupils under a racially non-discriminatory plan, will be vacated so that the court below will be free to take appropriate action. The decree in all other respects will be affirmed.

OPINION RE RECALL OF MANDATE.

The mandate of this court which was handed down on June 30, 1958 will be recalled, subject to the proviso that if the appellants have not filed a petition for writs of certiorari to the Supreme Court of the United States on or before August 14, 1958, and have not filed with the Clerk of this court a certificate to such effect by August 18, 1958, the mandate of this court shall issue forthwith to the court below to carry out and effect the judgments of this court.

We take this step so that the appellants, by application to the Supreme Court for writs of certiorari, may exhaust their legal remedies without the possible complication of the cases becoming moot by action of the court below effecting our judgments.

I am authorized to state that Judge KALODNER dissents and is of the view that in the light of all the circumstances, including the delay of the appellants in making application to this court in respect to the mandate, that the mandate should not be recalled.

EDUCATION
Public Schools—Florida

William M. HOLLAND, Jr., infant, by William M. Holland, Sr., his father and next friend v. THE BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, FLORIDA et al.

United States Court of Appeals, Fifth Circuit, August 26, 1958, 258 F.2d 730.

SUMMARY: A Negro child in Palm Beach County, Florida, applied to the county School Board under the state "Pupil Assignment Law" (1 Race Rel. L. Rep. 924) for transfer to a different school. The school to which transfer was requested was stated to have physical facilities superior to the school which was then attended, although it was a greater distance

from the home of the child. The request for transfer was denied. The child then brought an action in federal district court to require his admission to the school, contending that the denial of his application has been made on the basis of his race. The court found that the denial of transfer had been made as an administrative decision based on crowded school conditions and that there was no indication of discrimination on the basis of race. The case was dismissed. 2 Race Rel. L. Rep. 785. On appeal, plaintiff charged that the school districts were "gerrymandered" and that the Pupil Assignment Law was being applied discriminatorily so as unconstitutionally to maintain segregation. The Court of Appeals for the Fifth Circuit in reversing and remanding found it unnecessary to consider those specific charges, the record as a whole showing that a completely segregated public school system was being maintained by defendant, support by "compulsory residential segregation of the races by city ordinance." The court concluded that "no means of any description" could be used to deprive plaintiff of his constitutional rights.

Before Rives, Brown and Wisdom.

RIVES, Circuit Judge:

A child, by his father as next friend, complains that he and other Negro children are segregated in the public schools of Palm Beach County, Florida, solely on the basis of race, contrary to the constitution of the United States as construed in the School Segregation Cases.[1]

[*Petition of Board*]

On May 31, 1956, the child's parents petitioned the County Board of Public Instruction to organize the school districts so that, commencing with the next school term, the child would be permitted to attend the public schools under their jurisdiction on a nonsegregated basis. No such action was taken. When school reopened on August 30, 1956, the child was presented for enrollment at a school attended by white pupils only, but which lay outside the school district in which he and his parents resided. He was denied admittance. The district court held that such denial was because he resided in another school district and not because of his color. Full findings of fact were made by the district court from which it concluded:

> "The assignment of the plaintiff does not deny him any constitutional right, nor was he discriminated against by reason of that assignment, or the School Board's refusal to permit him to transfer to another more distant school."

The population of Palm Beach County is divided approximately one third Negro, and two thirds white. In the 1956-57 school term 34,920 children were enrolled in its schools. Negroes and whites attended different schools. The school district in which the plaintiff resides was created originally for tax purposes in 1912. It is designated by city ordinance as a Negro residential area, and the constitutionality of that ordinance is not directly attacked. The school district is bounded on one side by a railroad track and freight depot and on the other three sides by a white residential area which constitutes a separate school district.

The plaintiff charged that the school districts are "gerrymandered." The district court found otherwise. If we were to review that finding specifically, we would have to consider it in the light of the principle announced in several of our decisions[2] that the Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation.

[*Assignment Challenged*]

The plaintiff charged also that the Florida Pupil Assignment Law[3] was being applied discriminatorily so as to maintain segregation. The infant plaintiff was entitled to be treated simply as another school child without regard to his race or color, and the fact that he was a Negro did not vest him with a right to attend a school located in a district in which he did not reside when that geographical rule was being applied to all children alike.

That the plaintiff was ineligible to attend the school to which he applied would not, however, excuse a failure to provide nonsegregated

1. Brown v. Board of Education, 1954, 347 U.S. 483, and 1955, 349 U.S. 294.

2. E.g., Borders v. Rippy, 5th Cir. 1957, 247 F.2d 286, 271; Avery v. Wichita Falls Independent School District, 5th Cir. 1957, 241 F.2d 230, 233.

3. Florida Statutes Annotated, § 230.231, Laws 1956, Extraordinary Session, Chapter 31380.

schools. It is not necessary to review piecemeal the district court's findings of fact and conclusions of law, for the record as a whole clearly reveals the basic fact that, by whatever means accomplished, a completely segregated public school system was and is being maintained and enforced. No doubt that fact is well known to all of the citizens of the County, and the courts simply cannot blot it out of their sight. In the light of compulsory residential segregation of the races by city ordinance, it is wholly unrealistic to assume that the complete segregation existing in the public schools is either voluntary or the incidental result of valid rules not based on race.

A three-judge district court recently held that the Alabama School Placement Law is not unconstitutional *on its face*,[4] but concluded that ruling with a clear note of warning:

> "All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State."

Nothing said in that opinion conflicts in any way with this Court's earlier statement relative to the Florida Pupil Assignment Law:

> "* * * Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools."

Gibson v. Board of Public Instruction of Dade County, 5th Cir. 1957, 246 F.2d 913, 914.

So long as the appellant and other Negro children are segregated in the public schools solely on the basis of race, they and each of them (including the appellant) are being deprived of their rights under the Constitution as construed by the Supreme Court. There is no need, at this time, to consider separately the charges of "gerrymandering," or of unconstitutionality of the Florida Pupil Assignment Law either on its face or in its application. It is enough to observe that no means of any description can be legally employed to deprive the appellant of his rights under the Constitution.

The Court, being in some doubt as to the proper disposition to this case, called for additional briefs by the parties in answer to the following queries:

> "1. Should the Court treat the present case as a class action or as one solely on behalf of the infant appellant?
>
> "2. Are there any precedents for ordering general desegregation of the public schools, or for granting relief to a segregated class in cases which were not filed as class actions?
>
> "3. Does the Court have before it the necessary or indispensable parties for it to consider and decide whether or not such relief should be granted?
>
> "4. Assuming jurisdiction to exist, should the district court be required to proceed with general desegregation of the public schools, either county-wide or as between Pleasant City and Northboro Schools, upon the complaint of the plaintiff-appellant alone?
>
> "5. Should the Court confine its consideration of the present case to the question of whether the plaintiff-appellant was wrongfully denied admission to Northboro Schools?"

Those briefs have now been furnished. In addition, some fifty parents of some 189 Negro children who claim that they are entitled to or attending the public schools of Palm Beach County, Florida, have moved to intervene as appellants, and the appellees have vigorously objected to and opposed such motions to intervene. Intervention in this Court of Appeals should, we think, be denied.[5] Our denial of leave to intervene here, however, is without prejudice to the movants becoming additional parties plaintiff in the District Court after remand.

---

4. Shuttlesworth v. Birmingham Board of Education, N.D. Ala. m/s May 9, 1957,.....F.Supp.....

5. Morin v. City of Stuart, 5th Cir. 1939, 112 F.2d 585; Stallings v. Conn, 5th Cir. 1934, 74 F.2d 189, 191; 4 Moore's Federal Practice, 2d ed. page 99; 39 Am. Jur. p. 943.

[*Not Pleaded as Class Action*]

The present case resembles, but is not now pleaded as, a class action. Upon remand, the complaint may be, and probably will be, amended so as to meet the requirements of Rule 23, Federal Rules of Civil Procedure. Without such amendment, we think that the District Court has jurisdiction to enter a declaratory judgment and to relieve the plaintiff from a deprivation of his rights under the Constitution as construed by the Supreme Court. With appropriate amendment to the complaint, which should be permitted, the case may proceed in accordance with the practice in the usual actions of this kind.

The primary responsibility rests on the County Board of Public Instruction to make "a prompt and reasonable start," and then proceed to "a good faith compliance at the earliest practicable date" with the Constitution as construed by the Supreme Court.[6] "During this period of transition," the district court must retain jurisdiction to ascertain and to require good faith compliance.[7]

The judgment of dismissal in therefore reversed and the cause remanded.

REVERSED AND REMANDED.

6. See Borders v. Rippy, 5th Cir. 1957, 247 F.2d 268, 272; Rippy v. Borders, 5th Cir. 1957, 250 F.2d 690, 693.
7. Borders v. Rippy, supra; Avery v. Wichita Falls Independent School District, 5th Cir. 1957, 241 F.2d 230, 234, 235.

EDUCATION
Public Schools—Maryland

Thomas Conrad GROVES, Joan Elaine GROVES, Minors, by their parent, William Groves v. BOARD OF EDUCATION OF ST. MARY'S COUNTY, MARYLAND, G. Edward Thomas, President, et al., members of the board, and Robert A. King, Jr., Superintendent of the Schools of St. Mary's County.

United States District Court, District of Maryland, August 19, 1958, 164 F.Supp 621.

SUMMARY: A suit to desegregate the public schools of St. Mary's County, Maryland, was dismissed in July, 1956, by the federal district court in Maryland because the plaintiff Negro school children had not exhausted their state administrative remedies. *Robinson v. Board of Education of St. Mary's County*, 143 F.Supp. 481, 1 Race Rel. L. Rep. 862 (Md. 1956). Subsequently, the Board of Education of St. Mary's County declared that integration would begin with the school year 1957-1958 "on a voluntary basis, in the elementary grades, where it is administratively feasible." Two Negro children who had been attending a segregated school, applied for transfer to a previously "white" high school but their requests were denied by the county superintendent of schools. Their appeal to the State Board of Education was dismissed on February 26, 1958, because not filed within the period required by statute, the Board noting that it would have dismissed in any event because the superintendent had acted in good faith in carrying out the integration policy of the county board. *Groves v. Dent*, 3 Race Rel. L. Rep. 559 (1958). Suit was brought in the federal district court for Maryland on April 11, 1958, to secure admission of the two Negro children to the ninth and eleventh grades respectively of the "white" high school and to secure similar relief for others of their class. Prior to trial the County Board announced that for the school year 1958-1959, integration would be extended on a voluntary basis through grades seven, eight, and nine, and one plaintiff was notified that he would be admitted to the ninth grade of the "white" high school. The court held that the school officials had not shown sufficient justification for denying to the eleventh grade applicant the constitutional rights for which she had applied. "Constitutional rights are personal, and if plaintiff does not receive a desegregated education at this

time, she never will." The court stated, however, that these conclusions were reached "without disapproving the overall plan, and without prejudice to defendants' right to offer the plan as a defense if additional applications are filed."

THOMSEN, Chief Judge

The principal purpose of this action is to secure the admission of Thomas Conrad Groves, a Negro, to the ninth grade at the Great Mills High School in St. Mary's County, Maryland, and of his sister, Joan Elaine Groves, to the eleventh grade at that school.

Following the decision of this court in Robinson v. Board of Education of St. Mary's County, July 9, 1956, 143 F.Supp. 481, the Board of Education, on July 31, 1956, accepted the recommendation of the Citizens' Advisory Committee and declared that integration in the public schools of St. Mary's County would begin with the school year 1957-1958 on a voluntary basis in the elementary grades where administratively feasible. Nevertheless, in September, 1956, applications were filed with the Board seeking the admission of thirty-one Negro children to white public schools. After a number of conferences between the County Superintendent of Schools and the parents of some of the children, the Superintendent denied the applications. No appeals were taken from that action to the State Board of Education.

[*Instructions Distributed*]

In May, 1957, instructions to parents seeking pupil transfers were distributed to all school principals and parents and were publicized through PTA meetings, the public press and the Lexington Park radio station. Four Negro children requested transfer to elementary grades in white schools, and three Negro children, including the infant plaintiffs, requested transfer to high school grades. The Superintendent approved the requests for transfer to elementary grades, but denied the requests for transfer to high school grades, in accordance with the policy of the County Board. None of the four Negro children whose requests for transfer had been approved entered a white school; one moved out of the county; one request was withdrawn; the other two returned to the colored schools they had theretofore attended. The infant plaintiffs, through their father, appealed to the State Board of Education from the action of the County Superintendent denying their request. The appeals were not taken within the time fixed by statute. The State Board, however, granted a hearing, after which on February 26, 1958, it dismissed the appeals, but stated that if the appeals had been seasonably taken the Board would have dismissed them, because the Superintendent was acting in good faith pursuant to the integration policy promulgated by the County Board, and because "the question of whether the above-referred-to segregation policy as the County Board of Education of St. Mary's County contravenes the constitutional rights of the appellants in this case in denying their admission into the Great Mills High School is a question which is not within the scope of the powers of the State Board of Education to pass upon, or decide, for the reason that the same is a purely legal question to be decided through judicial proceedings." 3 Race Rel. L. Rep. 559. Thereafter, on April 11, 1958, this action was filed on behalf of the infant plaintiffs and all other Negroes similarly situated.

On April 22, 1958, pursuant to a resolution of the County Board, the County Superintendent announced that for the school year 1958-1959 integration would be extended on a voluntary basis through grades seven, eight and nine. No plan has been announced or adopted for grades ten, eleven and twelve, but the Vice President of the Board testified that "their thinking" was that it "would probably follow next year", but that there are "too many factors to be considered to make a statement that such will be the case".

[*To Be Admitted*]

Since the hearing in this case on June 23, 1958, the Superintendent has notified plaintiffs that Thomas Conrad Groves will be admitted to the ninth grade at the Great Mills High School in September, 1958.

William Groves, the father of the infant plaintiffs, is a self-employed electrician, a citizen and taxpayer of St. Mary's County for seven years, who was educated in unsegregated schools in the North. He has been dissatisfied with the Jarboesville School, a consolidated (elementary, junior high and senior high) school for Negroes, to which his children would normally be as-

signed, not only because it is a segregated school, but also because he considered its physical facilities unsatisfactory and because it did not offer all of the courses which were offered at the Great Mills High School, to which his children would have been assigned if they had been white.[1] He was so dissatisfied that for a time he sent his daughter to school in New York. That proved unsatisfactory, and more recently he has been sending her to the Cardinal Gibbons High School, a parochial school is St. Mary's County, although that school is many miles from his home, and he must pay a small tuition fee. He desires his daughter to attend the Great Mills High School because he wishes her to have a desegregated education and to take certain courses[2] leading to a "Stenographic Major" Commercial diploma, which are offered there but which have not heretofore been offered at the Jarboesville School.

[*School Building Program*]

Like most Maryland counties, St. Mary's is engaged in a school building program to care for its rapidly expanding school population, and to provide more adequate buildings and facilities. So, at one time the white school in a particular section may have better facilities than the colored school, whereas the next year the facilities of the colored school may be better, and vice versa. Until 1955 all facilities at Jarboesville were inadequate, and to a considerable extent they have remained so. However, a new elementary school building has just been completed, and a large addition thereto, including science and commercial rooms, for use by elementary, junior and senior high grades, will be completed next year.

At Great Mills High School there are two commercial curricula, one leading to a Commercial diploma, General Business Major, the other leading to a Commercial diploma, Stenographic Major. The latter requires two years of shorthand, and is considered the better certificate. Heretofore Jarboesville has offered only the General Business Major curriculum but plans to offer the Stenographic Major curriculum this fall as well. The shorthand, typewriting and other required courses will be the same at both schools, but the elective courses which will be given at either school will depend upon the number of students who choose each of the various elective courses which will be offered. There are various student "interest clubs" at both schools, more at Great Mills. The commercial department in each school has valuable contacts with local business enterprises, Great Mills with those operated by whites, Jarboesville with those operated by Negroes.

[*Program Not Equal*]

It is clear that the commercial program at Jarboesville was not equal to the commercial program at Great Mills in the spring of 1957, when Joan Elaine Groves applied for transfer to Great Mills. It is impossible to determine at this time whether the new Stenographic curriculum which will be offered there this fall will be equal to the Stenographic curriculum at Great Mills.

It is doubtful whether any possible inequality in the programs may still be considered in such a case as this. See Brown v. Board of Education, 347 U.S. 483, 349 U.S. 294. The offering of certain courses or certain curricula in white schools which are not offered in any colored school in the county may be an element which should be considered by the court in weighing "the public and private considerations" referred to in the second Brown opinion. However, I do not base my decision of this case on any possible inequality between the programs at the two schools.

The Supreme Court has ruled that Negro children have a constitutional right to a desegregated education. The denial of that right to a child who applies for it can be justified only on equitable grounds similar to those listed in the second Brown opinion:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for

1. Counsel, court and witnesses, including the Superintendent of Schools, used the word "course" from time to time in two different senses, noted by Webster, New Int'l Dict., 2d ed., as follows: "a. An entire series of studies having a unified purpose and usually leading to a degree or a diploma; as, a four-year *course;* a post-graduate *course.* b. In schools and colleges, a unit of instruction consisting of recitations, lectures, laboratory experiments, or the like, in a particular subject; also, the subject matter of such a unit of instruction." To avoid confusion, I will use the word "course" in the narrower sense to mean an individual unit, and will use the word "curriculum" to mean the entire series of "courses" leading to a particular diploma.
2. Dictation and Transcription.

adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated is accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." 349 U.S. at 300-301.

This court held in the Robinson case, 143 F.Supp. at 492, that St. Mary's County had made a prompt and reasonable start toward compliance with the Supreme Court's ruling. The plan of desegregation which it has adopted appears to proceed with more than "deliberate" speed. But such a plan cannot be considered in the abstract, apart from the particular facts of each case. A delay which might be necessary to permit the solution of administrative problems created by the transfer of a considerable number of students is not justified in this case where only two Negro students are applying for admission to a white school, where one has been accepted into a grade which has already been desegregated, and it is hoped to desegregate the remaining grades next year.[3] The order of the State Board, read in connection with the opinion in the Robinson case, indicates that the State Board found no administrative problem justifying the denial of the applications filed on behalf of the two Groves children. The State Board evidently regarded the case as raising only a legal question of constitutional rights.

The second opinion of the Supreme Court in the Brown case, 349 U.S. at 300, 301, requires district courts to weigh the equities and to adjust and reconcile public and private needs. I do not question the good faith of the defendants in adopting the plan of desegregation nor their sincere belief that a further delay in the complete desegregation of the high schools is desirable. But constitutional rights are personal, and if Joan Elaine Groves does not receive a desegregated education at this time, she never will. Her rights and her needs cannot properly be postponed simply because the County Board and certain members of the community think it would be wiser to delay desegregation of the three highest grades. Without disapproving the overall plan, and without prejudice to defendants' right to offer the plan as a defense if additional applications are filed, I conclude that defendants have not shown any legally sufficient justification for denying to the infant plaintiff, Joan Elaine Groves, the constitutional right for which she has applied. Brown v. Board of Education, supra; Slade v. Board of Education of Harford County, 4 Cir., 252 F.2d 291, aff'g Moore v. Board, D.Md., 152 F.Supp. 114, cert. den. 357 U.S. 906; Allen v. County School Board of Prince Edward County, 4 Cir., 249 F.2d 462, 465; School Board of City of Charlottesville v. Allen, 4 Cir., 240 F.2d 59, cert. den. 353 U.S.

3. The time has already expired within which application may properly be made under the regulations of the County Board by any student, white or Negro, for transfer from one public school to another for the year 1958-59.

910; Rippy v. Borders, 5 Cir., 250 F.2d 690; Aaron v. Cooper, 8 Cir., 243 F.2d 361.[4]

An appropriate decree will be entered.

4. In School Board of City of Charlottesville v. Allen, supra, Judge Parker quoted with approval the apt language of Judge Bryan: "It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U.S. 483 and 349 U.S. 294, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliances with that ruling may well not necessitate such extensive changes in the school system as some anticipate." 240 F.2d at 62.

EDUCATION
Public Schools—Michigan

Shannon Marguerite HENRY, by Marilyn Ann Henry, her next friend, v. Walter GODSELL, et al., individually and as members of the Pontiac School Board.

United States District Court, Eastern District, Michigan, August 12, 1958, No. 14,769.

SUMMARY: Injunctive relief and damages for violation of the Civil Rights Act were sought in a class action brought in federal district court in Michigan by a Negro school child against the Pontiac School Board. The plaintiff alleged that defendants were maintaining a segregated school resulting from new school construction and the alteration of attendance areas with compulsory attendance at the new school. The defendants admitted the actions alleged but denied any purpose to segregate. It was asserted that decisions had been made on the basis of school population density, trends of residential construction, distances from homes to proposed school sites, topographic features bearing on accessibility, and traffic-safety problems. The court held the actions of the defendant Board based on such factors to be within the permissive exercise of administrative discretion and dismissed the complaint. In the absence of other evidence, the court said, "The fact that in a given area a school is populated almost exclusively by the children of a given race is not of itself evidence of discrimination. The court also held that under the circumstances the plaintiff had no constitutional right to attend a public school outside the attendance area wherein she resided.

LEVIN, District Judge.

OPINION

Plaintiff, a minor and a Negro, by her mother as next friend, brings this action for injunctive relief and damages in behalf of herself and others similarly situated, against the defendant School Board and its members, pursuant to the provisions of the Civil Rights Act, 28 U.S.C., Section 1343, Subsections (1) and (3) [1]. It is her claim that the defendants have violated the Civil Rights Act by maintaining a segregated school system and requiring her to attend a segregated school in violation of the mandate of the Supreme Court. Brown, et al. v. Board of Education of Topeka, et al., 347 U.S. 483 [2].

No contention is made that the alleged discrimination is sanctioned by state law which

1. "§ 1343 Civil rights and elective franchise. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

2. For a scholarly discussion of Brown v. Board of Education and its implications see, Professor Paul G. Kauper, "Segregation in Public Education, The Decline of Plessy v. Ferguson," 52 Michigan Law Review, 1137.

should be declared unconstitutional. Segregation in public schools have been prohibited by statute in Michigan since 1867 [3].

Plaintiff alleges that segregation has been accomplished by constructing a new school in an area occupied almost exclusively by Negroes; by altering and modifying attendance areas so that the population of certain schools is almost exclusively Negro; by establishing a new primary school district which requires her and others to transfer to the new school; and by refusing to permit her to attend a public school of her own choice without regard to the attendance area or district in which she resides.

[*Admit School Built*]

The defendants admit that a school was built in an area occupied almost exclusively by Negroes; that attendance areas were altered; that a new primary school district was established which required the plaintiff to transfer to the new school; and that she has been refused permission to attend a public school of her own choice; but deny, in all of this, any purpose to establish or maintain a segregated school system.

In addition to the oral testimony of witnesses, more than forty exhibits, consisting of aerial maps, charts, graphs and official records of the school district, were received in evidence; all with reference to population distribution and school districting in the areas with which we are here concerned.

The school district of Pontiac includes the City of Pontiac, Michigan, parts of six adjoining townships, the City of Sylvan Lake and the Village of Lake Angeles. The present estimated population of the City of Pontiac is 85,000 of which Negroes number about 11,000.

3. S.L. 1867, Volume I, Page 43, provided in part that: "All residents of any district shall have an equal right to attend any school therein. Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient."

In 1869 in ex rel. Workman v. Board of Education of Detroit, 18 Mich. 399, the Supreme Court of Michigan, speaking through Justice Cooley, held that this act prevented the Board of Education of the City of Detroit from excluding or making any regulation that would exclude any resident of the district from attending any school because of race, color, or creed.

A substantially similar provision is embodied in the present school code. Section 55 of the School Code of 1955, M.S.A. 15.3355.

[*Statistics Not Kept*]

The Board of Education, prior to the institution of this suit, did not keep statistics as to the colored and white composition of the school population. At my suggestion, a survey was taken which reveals that Negro children are enrolled in and are attending 17 out of 31, or over half of the public schools located in the various attendance areas. Provided only that a child's legal residence is within the attendance area prescribed for a school it has been the practice of the Pontiac school district to enroll that child in such school without regard to color. At the present time there is only one high school in the Pontiac school district, and this high school is attended by students of both races. A second high school is now under construction and the school authorities have stated that any student residing in that attendance area will be enrolled.

The enrollment of the Pontiac school district has increased from 13,734 in 1946 to 18,807 in November 1957. It is estimated that by 1965 the school enrollment will nearly double the 1946 enrollment. It is conceded by the plaintiff that the Pontiac school system is overcrowded. To alleviate this overcrowded condition and to provide for the expected growth in school population, the Board of Education authorized the construction of additional schools and the modernization and enlargement of existing facilities. Since 1954 six new schools have been constructed. In 1953, as part of this plan, the Board decided to build a new elementary school to accommodate the more than capacity enrollment in schools serving the southwest quadrant of the city where by far the largest number of the Negro families are concentrated. Two sites were under consideration for this new school, namely, the so-called "Lake Street" and "Golf Drive" sites.

[*Densely-Populated Area*]

The Lake Street site, which was ultimately approved, is located in a densely populated area within a radius of half a mile from the homes of the children who attend the school. The children are subjected to no safety hazards in their approach to the school. As a suitable location for a new school, the Golf Drive site suffers by comparison. There is an absence of any sizeable concentration of population near that site. It is located 1.6 miles from the nearest home of the children of the area who need to be served and

is separated from the population area to be served by a lake, a large swamp area, and a municipal golf course. There are no streets that directly connect the site and the residences of the children who would attend the school. The site is accessible only by travelling a circuitous route and crossing an arterial highway. The dangers to which children of tender years would have been exposed are readily apparent. On October 13, 1954 the Board decided to build on the Lake Street site. The new school was ready for occupancy at the beginning of the September 1955 term and is now populated almost exclusively by Negro children.

Plaintiff has suggested that the difficulties presented by the Golf Drive site could have been overcome either by building a causeway to provide a direct route to the site or by furnishing transportation between the site and the homes of the children. The Board of Education does not have the authority to construct roads, bridges or sidewalks. To provide transportation services would be costly, requiring the expenditure of funds that are needed to expand educational facilities.

The school board has a duty to provide educational facilities to all children without regard to their color. If it builds schools in areas where need exists, without arbitrarily fixing attendance areas to exclude any given segment of the school population, it is carrying out that duty. It may consider such factors in selecting sites that it considers relevant and reasonable and, in the absence of a showing that the standards for selection are not relevant and reasonable and that in reality they were adopted as a sham or subterfuge to foster segregation, or for any other illegal purpose, their use is within the administrative discretion of the school board. The fact that in a given area a school is populated almost exclusively by the children of a given race is not of itself evidence of discrimination. The choice of a school site based on density of population and geographical considerations such as distance, accessibility, ease of transportation, and other safety considerations, is a permissible exercise of administrative discretion. The selection of the Lake Street school site was based upon these factors and the standards observed were not adopted as a device to circumvent the law.

[*Some Areas Altered*]

Plaintiff also alleges that some attendance areas in the school district were altered in 1955 to compel or achieve segregation. This allegation is devoid of merit. The Board of Education has altered and modified attendance areas from time to time to accommodate changes in population and as a result of the erection of new schools and additions to existing schools. The changes in attendance areas that were made in 1955 were in response to the building construction that was then taking place. In the absence of a showing that attendance areas have been arbitrarily fixed or contoured for the purpose of including or excluding families of a particular race, the Board of Education is free to establish such areas for the best utilization of its educational facilities. Michigan Statutes Annotated, Sec. 15.3589 [4]. The evidence establishes that the same permissible considerations that served as a basis for selecting new school sites were employed in fixing school attendance areas.

The plaintiff has no constitutionally guaranteed right to attend a public school outside of the attendance area in which she resides. The utter chaos that would prevail if each child were permitted to choose the school that he or she desired to attend without regard to the attendance area in which the child resides is readily apparent. It was a proper exercise of the Board's power to transfer plaintiff and others similarly situated to the Lake Street school when that school was designated to serve the area resided in by these children.

[*Few Students Excepted*]

A few students, because of special circumstances, are permitted to attend a school not in their attendance area. Such permission is granted by the school authorities upon a proper showing, based on their established standards. It conclusively appears from the testimony that the standards applicable for special transfer, which do not include any considerations of race, have been adhered to in every respect.

Nowhere in the record of this case is there any evidence tending to support the plaintiff's claim of a conspiracy to deprive her of her constitutionally guaranteed rights.

The solicitude of the parents of the young child whose rights are asserted here for an education "on equal terms" [5] with all other children

4. M.S.A. 15.3589 provides that "Every board is authorized to establish attendance areas within the school district."
5. The quoted words are those of Chief Justice Warren in Brown v. Board of Education.

has been forcefully presented by her father who appeared as counsel. In view of the serious charges made against those responsible for public education in Pontiac, it is proper to set forth their stated views on the subject of segregation as gleaned from the testimony, and some other pertinent factors of the operation of the Pontiac school system.

[*View of Superintendent*]

Dr. Dana P. Whitmer, the Superintendent of Schools, wrote his doctoral thesis on the problems of inter-group education in the public schools. He said he believes that segregation is inimicable to the democratic way of life. In his testimony before me he stated:

> "As a result of my own experience in Pontiac, and in Gary and previously, as well as my own study of this major problem which we face in our country, I feel that segregation, sanctioned in a school district, for example, is both abhorrent and illegal. Certainly if in this country we are to achieve in reality the ideals and principles on which it was founded segregation, which prevents the natural and normal association together of people of varying ethnic, religious and racial backgrounds, must not be sanctioned in this country. And, consequently, in the discussions with the Board of Education of the School District of the City of Pontiac we have attempted continually to take such action as would not segregate the schools."

Glenn H. Griffin, the President of the Board of Education, and other Board members expressed similar views. The record convincingly establishes that the philosophy expressed by those witnesses has been carried into operation by the Pontiac Board of Education. That the policies of the Board of Education were not motivated by racial considerations is attested by the following facts:

The Board of Education employs teachers on the basis of character, competency and training without regard to color. Approximately 10% of the teachers in the school system are Negroes. White and Negro children in the district participate on a non-segregated basis in such day and night school activities as athletics, band, dramatics, debating, school clubs, dances, choruses and festivals. The 1957 high school varsity football team consisted of 24 Negro members out of a total of 55. White and Negro children mingle freely in lunch rooms and on playgrounds, and in classes for retarded and handicapped children there is no evidence of discrimination as to race.

The plaintiff has failed to present a case for any relief by this Court and an order dismissing the complaint may be submitted for signature. No costs will be allowed.

EDUCATION
Public Schools—North Carolina

Joseph Hiram HOLT, Jr., a Minor, by His Next Friend, Joseph Hiram Holt and Elwyna Holt v. THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate

United States District Court, Eastern District of North Carolina, Raleigh Division, September 17, 1958, 164 F.Supp. 853.

SUMMARY: A Negro high school student and his parents filed an action in federal district court against Raleigh, North Carolina school officials for declaratory and injunctive relief with respect to the students' right to attend the public schools without discrimination because of race. Plaintiffs lived nearer an all-white high school than the all-Negro school to which the boy had been assigned on May 30, 1957. On June 8, 1957, plaintiffs had applied for change of assignment of the boy to the white school, citing geographical convenience, academic and extra-curricular advantages, and the benefit of removing the stigma of racial segregation. [See 1 Race Rel. L. Rep. 240; 939 (1956) for the North Carolina Pupil Assignment Act.] At a August 6, 1957 meeting, which plaintiffs did not attend although invited, the Board denied the application. On August 9, plaintiffs by letter protested the action

taken and applied for a "hearing" as provided by the Act. The board notified plaintiffs that a hearing in their case had been called for August 23. Plaintiffs did not attend this hearing personally but were represented by their attorney, who presented a power of attorney and a petition requesting the Board to reconsider and reverse its previous action. The Board at its next meeting, voted not to rescind the August 6 action. On these facts, the court held that plaintiffs had failed to exhaust their administrative remedies under that state Pupil Assignment Act. The court said plaintiffs should have appeared personally at the August 23 hearing which had been called at their request. The court held that the Pupil Assignment Act, in providing for one whose application for reassignment had been disapproved to apply for a "hearing", contemplated more than written applications, but an opportunity for the board involved to interview personally the applicant with regard to the reasons given for entitling him to reassignment. The court gave plaintiffs ten days after announcing its opinion to file a motion requesting that the case be retained on its docket until they had had an opportunity adequately to exhaust their administrative remedies. No such motion was filed, and the case was dismissed.

OPINION

STANLEY, District Judge

This action was commenced on August 29, 1957, by Joseph Hiram Holt, Jr., a 15-year-old Negro citizen of Raleigh, North Carolina, and his parents, Joseph Hiram Holt and Elwyna Holt, against the Raleigh City Board of Education, to have declared the rights of the minor plaintiff to attend the public schools of the City of Raleigh without discrimination on account of race or color, and for an injunction restraining such discrimination. Prior to the commencement of the action, the plaintiffs had sought the reassignment of the minor plaintiff from the J. W. Ligon Junior-Senior High School to the Needham B. Broughton Senior High School.

For convenience, Joseph Hiram Holt, Jr. will hereinafter be referred to as the "minor plaintiff," his parents, Joseph Hiram Holt and Elwyna Holt, will be referred to as the "adult plaintiffs." The Raleigh City Board of Education will be referred to as the "Board of Education," the J. W. Ligon Junior-Senior High School will be referred to as the "Ligon High School," and the Needham B. Broughton Senior High School will be referred to as the "Broughton High School."

[*Motion to Dismiss*]

Before answering, the defendant moved to dismiss the action on the ground that the complaint failed to state a claim against the defendant upon which relief could be granted. This motion was found to be without merit and was denied by order entered on October 10, 1957. The defendant thereafter filed its answer making a general denial of most of the allegations of the complaint and alleging several specific defenses.

On January 7, 1958, the plaintiffs filed a motion for summary judgment on the ground that from the undisputed facts appearing in the pleadings, plaintiffs were entitled to a judgment against the defendant as a matter of law. This motion was denied by order entered on January 28, 1958.

On April 9, 1958, the Attorney General of North Carolina filed a motion requesting leave to present the views of the State of North Carolina in the capacity of Amicus Curiae as to the issues raised by the pleadings. This motion was granted by order dated April 22, 1958.

The case came on for trial before the court without a jury on July 14 and 15, 1958. At the opening of the trial, the court requested counsel for the plaintiffs and the defendants to confer with the view of stipulating such of the basic facts as were not in dispute. This conference proved to be fruitful and many facts were stipulated. At the conclusion of the trial, the Court took the case under advisement pending receipt of briefs from the parties, including the Attorney General of the State of North Carolina, and the presentation of oral arguments. Oral arguments were presented on August 8, 1958.

The briefs for the parties having been received, the Court, after considering the pleadings and the evidence, including the stipulations filed, and the briefs and oral arguments of the parties, including the Attorney General of the State of North Carolina, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated.

FINDINGS OF FACT

1. The minor plaintiff, Joseph Hiram Holt, Jr., is a member of the Negro race, 15 years of age, a citizen and resident of the City of Raleigh, and brings this action through his duly appointed next friend, Joseph Hiram Holt. The adult plaintiffs, Joseph Hiram Holt and Elwyna Holt, are also members of the Negro race, are the parents of the minor plaintiff, and are citizens and residents of the City of Raleigh. This action was duly and properly instituted in this court, summons was duly served, and the parties are properly before the Court.

2. The defendant, Board of Education, exercises such powers and duties as are conferred upon it by Chapter 115 of the General Statutes of North Carolina, and operates in the City of Raleigh two senior high schools, namely, the Ligon High School and the Broughton High School.

3. The plaintiffs reside at 1018 Oberlin Road in the City of Raleigh, which is a distance of less than one mile from the Broughton High School and a distance of more than three and one-half miles from the Ligon High School.

4. The minor plaintiff is now assigned to and enrolled in the Ligon High School, and has been so enrolled since the beginning of his ninth grade, which was the 1956-1957 school term.

5. On May 30, 1957, the Board of Education delivered to the minor plaintiff a certificate of promotion and assignment, wherein it was certified that he had satisfactorily completed the course of study for the ninth grade in the Ligon High School and had been assigned to the tenth grade at the Ligon High School for the school year 1957-1958.

6. On June 8, 1957, the adult plaintiffs filed with the principal of Ligon High School an application for change of pupil assignment, wherein it was requested that the minor plaintiff be assigned to the Broughton High School for the 1957-1958 school year. The application was on a form supplied by the Board of Education, and gave the following specific reasons as to why the minor plaintiff should not attend the Ligon High School to which he had been assigned, and as to why he should be reassigned to the Broughton High School:

"13. State specific reasons why child should not attend school to which child has been assigned. (If more space necessary, attach additional sheet.)

"Attendance at the J. W. Ligon School, to which pupil has been assigned, is an illegal inconvenience to both pupil and parents. Further, assignment to such school has been made purely on a racial basis with the view of fostering and continuing total segregation of pupils in the Raleigh School System. For additional reasons, see remarks under Item 14.

"14. State specific reasons why child should be assigned to the school named by you in Paragraph 11 above. (If more space necessary, attach additional sheet).

"J. W. Ligon High School is more than 3 miles from the residence of the pupil and attendance at the Ligon School imposes physical and mental inconvenience upon both pupil and his parents. The school to which reassignment of the pupil is herein requested, namely, Needham Broughton High School, is only 8 blocks, more or less, or less than a mile from the residence of the pupil and is within walking distance of the pupil's home. Needham Broughton School is a senior high school which offers all of the courses which the pupil has interest in. Moreover, the pupil's attendance at the school nearest to him, namely, Needham Broughton High School, also offers to the pupil a fuller academic and extra-curricula program. Finally, the pupil's attendance at a school nearer his residence on a non-segregated basis offers to him the added advantages of removing the illegal stigma of racial segregation from his scholastic endeavor."

The application for change of pupil assignment was transmitted by the Principal of the Ligon High School to the Secretary of the Board of Education, who is also the Superintendent of the Raleigh Schools, as required by the rules and regulations of the Board of Education.

7. At its meeting on June 11, 1957, the Board of Education deferred action on all applications for change of school assignment for the 1957-1958 school year, including the application of the plaintiffs, until the next meeting of the Board. The following is an excerpt from the minutes of said meeting of the Board of Education:

"A number of applications for a change of school assignment for 1957-58 were presented to the Board by the Secretary. Action on these applications was deferred until the next meeting.

"The Secretary gave the Board an application for change of assignment of Joseph H. Holt, Jr., from J. W. Ligon Junior-Senior High School to Needham Broughton High School. Upon motion by Mr. Martin, seconded by Mr. Powell, action on this application was deferred until the next meeting of the full Board."

8. On June 12, 1957, Mr. Samuel S. Mitchell, of counsel for the plaintiffs, wrote a letter to the members of the Board of Education expressing dissatisfaction over the fact that the Board had not considered the application of the plaintiffs for reassignment at its June 11 meeting, particularly in view of the fact that other business had been transacted, including the reassignment of some sixty-five other students, and requesting that the application of the plaintiffs be immediately brought before the Board for consideration.

9. On June 13, 1957, Mr. Jesse O. Sanderson, Superintendent of the Raleigh Public Schools and Secretary of the Board of Education, wrote Mr. Mitchell that he was in error in his assumption that the Board of Education at its June 11 meeting had considered the application of other students for reassignment, and stated that the Board deferred action on all applications for change of school assignment, including those of both white and Negro students, for the 1957-1958 school year.

10. At its meeting on July 9, 1957, the application for change of school assignment of the minor plaintiff was considered by the Board of Education. After some discussion, resolutions were adopted listing the application of the minor plaintiff as the first item of business on the agenda at its regular meeting on August 6, and requesting that the minor plaintiff and his parents be present at said meeting. The following is an excerpt from the minutes of said meeting:

"The application for change of school assignment of Joseph Hiram Holt, Jr., from J. W. Ligon School to Needham Broughton High School was considered by the Board. After a discussion of this application, Mr. Carnage moved that the application of Joseph Hiram Holt, Jr., be listed as the first item of business on the agenda for the regular meeting on August 6 and that the Board act on the application at this time. The motion was seconded by Mr. Fisher and unanimously passed.

"A motion by Mr. York, seconded by Mr. Powell, that Joseph Hiram Holt, Jr., and his parents be requested to be present at the August 6 meeting was unanimously passed."

11. On July 15, 1957, Mr. Jesse O. Sanderson, pursuant to the action taken by the Board of Education at its meeting on July 9, wrote the following letter to Mr. and Mrs. Joseph H. Holt, the adult plaintiffs, at 1018 Oberlin Road, Raleigh, North Carolina:

"Your application for a change of the school assignment for 1957-58 of your son Joseph Holt, Jr., will be considered by the Board of Education on Tuesday, August 6, at about 1:00 p.m. The Board has authorized the secretary to request you and your son to be present at the time your application is being discussed. There will probably be questions about your application for a change of assignment that various Board members may wish to ask you and your son."

12. On July 17, 1957, Mr. Samuel S. Mitchell, of counsel for the plaintiffs, wrote the Board of Education the following letter, which was in response to the letter written by Mr. Sanderson on July 15, 1957, to the adult plaintiffs:

"As you no doubt know, we represent the parents of Joseph H. Holt, Jr., who have filed an application for the re-assignment of said child to Needham Broughton High School for the 1957-58 school term. We note that you plan to take action on this application at your August 6th meeting. We also note that there has been discussion as to whether the parents of young Holt will attend this August 6th meeting.

"This is written to inform you that we are advising our clients, the Holts, not to attend this meeting and to await the decision of your Board upon their application by the registered mail which is required by North Carolina General Statutes 115-178,

Section 3. *As we read the Pupil Assignment Act, the Board's initial action on an application for re-assignment is purely ex parte.* We wish to assure you that the Holts will take our advice in this matter and that they will not attend your August 6th meeting." (Emphasis supplied.)

13. At a meeting held on August 6, 1957, the Board of Education considered the application of the minor plaintiff for a change of school assignment for the 1957-1958 school year from the Ligon High School to the Broughton High School, and denied the application. The following is an excerpt from the minutes of said meeting:

"The application for a change of school assignment for 1957-58 for Joseph Hiram Holt, Jr., from J. W. Ligon Junior-Senior High School to Needham Broughton High School was next considered by the Board. Mr. York moved that in public interest and in the interest of Joseph Hiram Holt, Jr., that this application for a change of assignment be denied at this time. The motion was seconded by Mr. Fisher. After considerable discussion a vote on the motion was called for by the chairman. Five members voted 'aye' and one member voted 'no'. The chairman declared the motion carried five to one."

14. Neither of the plaintiffs attended the meeting of the Board of Education held on August 6, 1957, when the application for change of school assignment was considered.

15. On August 7, 1957, Mr. Sanderson wrote the adult plaintiffs as follows:

"The application for change of assignment of your son, Joseph H. Holt, Jr., from J. W. Ligon Junior-Senior High School to Needham Broughton High School during the 1957-58 school year was considered by the Board of Education in a meeting on Tuesday, August 6. The Board's decision was that your application for reassignment, in the public interest and in the interest of your son, be denied at this time."

16. On August 9, 1957, the adult plaintiffs sent to the Board of Education the following communication, duly verified, expressing dissatisfaction with the action taken by the Board on August 6, 1957, in denying the application of the minor plaintiff for a change of school assignment, and making application for a hearing:

"THE UNDERSIGNED parents of Joseph Hiram Holt, Jr., who seasonably made application for the change of the school assignment of said Joseph Hiram Holt, Jr., from the J. W. Ligon Junior-Senior High School to the Needham Broughton High School, are dissatisfied with and except to the ruling of the Board upon such application, which ruling was made Tuesday, August 6, 1957, and Notice of which was received by the undersigned on the 8th day of August, 1957, the said ruling denying application made by and for the said Joseph Hiram Holt, Jr., for change of school assignment from Ligon Junior-Senior High School to Needham Broughton High School. THE UNDERSIGNED RESPECTFULLY HEREBY MAKE APPLICATION TO THE BOARD OF EDUCATION OF THE CITY OF RALEIGH *FOR A HEARING* IN THIS MATTER BEFORE SAID BOARD AS PROVIDED IN NORTH CAROLINA GENERAL STATUTES 115-178, SUBSECTION 3, AND REQUEST THE *SAID HEARING* BE SET IMMEDIATELY, TIME BEING OF THE ESSENCE." (Emphasis supplied).

17. On August 12, 1957, Mr. Sanderson wrote the following letter to the adult plaintiffs advising that a meeting of the Board of Education had been called for Friday, August 23, for a hearing on the ruling of the Board denying the application of the minor plaintiff:

"A called meeting of the Board of Education has been scheduled for Friday, August 23, at 12:30 p.m. for a hearing on the ruling of the Board denying your application for change of assignment for your son Joseph Hiram Holt, Jr.

"Since the Board meetings are luncheon meetings, the hearing will likely begin at 1:00 p.m. on Friday, August 23."

18. The Board of Education met at the scheduled time on August 23, 1957, for the purpose of conducting the requested hearing. Neither of the plaintiffs appeared at the hearing but were represented by Mr. Herman L. Taylor, one of plaintiffs' attorneys. When the hearing on the application was reached, Mr. Taylor filed

with the Board a verified petition and a verified power of attorney, both signed by the adult plaintiffs. The petition reviewed the previous proceedings before the Board, acknowledged receipt of the letter of August 12 granting the hearing, and requested the Board to reconsider its August 6, 1957, decision and approve the change of pupil assignment as originally requested in the application of June 8, 1957. The power of attorney appointed Herman L. Taylor and Samuel S. Mitchell, of the law firm of Taylor and Mitchell, the true and lawful attorneys of the adult plaintiffs, to appear and represent them before the Board of Education in connection with the application on behalf of the minor plaintiff for change of pupil assignment.

19. The following are excerpts from the minutes of the meeting of the Board of Education held on August 23, 1957, showing the action taken by the Board on the application of the adult plaintiffs for a hearing:

"The secretary presented to the Board the attached request for a hearing from Joseph Hiram Holt and his wife Elwyna Haywood Holt. The chairman then invited anyone who wished to speak in behalf of the application for a change in the assignment of Joseph Hiram Holt, Jr. to do so. H. L. Taylor, attorney, at this point gave to the Board the attached instrument of Power of Attorney and the attached Petition. Attorney Taylor requested the Board to rescind its action of Tuesday, August 6, 1957, denying application made by Joseph Hiram Holt, Jr., for a change in school assignment from J. W. Ligon Junior-Senior High School to Needham Broughton High School.

* * *

"Mr. York then moved that the action taken on Tuesday, August 6, 1957, denying the application of Joseph Hiram Holt, Jr., for a change of school assignment stand. The motion was seconded by Mr. Fisher. A substitute motion was made by Mr. Martin that further study of the application of Joseph Hiram Holt, Jr., be made by the committee appointed on August 6, 1957, and that the committee report to the Board at the next meeting. The substitute motion was seconded by Mr. Carnage. After a brief discussion, the chairman called for a vote on the substitute motion. The substitute motion was passed. The passage of this substitute motion concluded the hearing of the request of Joseph Hiram Holt, Jr., for a change in school assignment for the 1957-58 school year."

20. The chairman gave everyone present at the meeting of the Board on August 23 an opportunity to speak for or in opposition to the petition presented on behalf of the minor plaintiff. The only one who took advantage of the opportunity was Rev. S. F. Daly, who read a letter protesting the previous action of the Board.

21. At its meeting held on August 28, 1957, the Board of Education received the report of the committee appointed pursuant to the resolution adopted on August 23, 1957, and adopted a resolution declining to rescind the previous action of the Board on the request of the plaintiffs for a change in assignment. The following is an excerpt from the minutes of the meeting of the Board taking this action:

"Mr. Martin, chairman of the committee that was assigned to make further study of the Joseph Hiram Holt, Jr., application for change of school assignment from J. W. Ligon Junior-Senior High School to Needham Broughton High School during the 1957-58 school year was requested by the chairman to make a committee report and recommendation. Mr. Martin reported that the committee, including Mr. York and Mr. Carnage, met in the afternoon on August 27, 1957, with the superintendent in attendance. Mr. Martin stated that the Joseph Hiram Holt, Jr., application was discussed and considered by the committee and the committee recommended that in the interest of the public, and in the best interest of the Raleigh Public Schools and for the welfare of Joseph Hiram Holt, Jr., that the previous action of the Board on this request for a change of assignment not be rescinded at this time. Mr. Martin noted that Mr. Carnage voted against the committee report.

"Mr. Martin moved that the report of the committee be accepted. The motion was seconded by Mr. York and passed. Mr. Martin, Mr. York, Mrs. Stough, Mr. Fisher and Mr. Powell voted for the motion. Mr. Carnage voted against the motion."

22. In May, 1957, the Board of Education adopted certain rules and regulations governing the assignment and enrollment of pupils in the Raleigh administration unit, and the procedure for conducting hearings on applications for reassignment to specific schools. Generally, these rules and regulations provided (a) that prior to the close of each current year the Board shall assign to a school for the following year each child theretofore attending a school by assignment from the Board, (b) that the parent or guardian of any child who is dissatisfied with the assignment made by the Board, may, within 30 days after notification of assignment, apply in writing to the Board for reassignment of the child to a different school, (c) that such applications shall be made on forms to be approved by the Board and delivered to the principal of the school to which the child was last assigned, (d) that such application shall state in detail the specific reasons why the parents are dissatisfied with the school to which the child had been assigned and the specific reason why the applicants think the child should be assigned to the school to which they seek his admission, (e) that the application must be verified by both parents, (f) that the application, if in proper form, shall be considered at the earliest practicable date by the Board, and the parents shall be notified of the time and place of the hearing, and have the right to be heard and present witnesses in support of the application, (g) that in addition to receiving such evidence as might be presented on behalf of the parents the Board may receive evidence in opposition to the granting of the application or may conduct investigations on any objections offered, or on its own motion, including examination of the child involved, so as to make a proper decision on the application, and (h) that a decision on the application would be rendered by the Board as early as practicable and that the parents would be notified thereof in writing.

23. Prior to the 1957-58 school year, the Board of Education had followed a fixed policy of assigning all white children living within the Raleigh administrative unit to the Broughton High School and all Negro children living within said administrative unit to the Ligon High School.

24. At a meeting held on May 14, 1957, the Board of Education adopted a resolution providing that each child then attending a school by assignment from the Board be assigned to the same school for the year 1957-1958.

25. Prior to the 1957-1958 school year, no Negro student had ever attended the Broughton High School and no white student had ever attended the Ligon High School.

26. The minor plaintiff satisfactorily completed the course of study prescribed for the ninth grade in the Ligon High School during the 1956-1957 school year and satisfactorily completed the course of study prescribed for the tenth grade in the Ligon High School during the 1957-1958 school year. He has been assigned to the eleventh grade in the Ligon High School for the 1958-1959 school year.

DISCUSSION

Based on the foregoing facts, the principal questions presented to the Court for determination are (1) whether the plaintiffs have exhausted their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, and (2) whether the minor plaintiff was refused reassignment to the Broughton High School on account of his race. In view of the conclusions reached with respect to the first question, little discussion of the second question will be required.

I.

Whether The Plaintiffs have exhausted their Administrative Remedies under the North Carolina Assignment and Enrollment of Pupils Act.

Whatever might be the law in other circuits, and in other states in this circuit, it is abundantly clear that in North Carolina plaintiffs in suits of this type must exhaust their administrative remedies under the state law relating to the assignment and enrollment of pupils in public schools before the Courts of the United States will grant injunctive relief. This is plainly the holding of the Court of Appeals for this circuit in the Carson cases.

In Carson v. Board of Education of McDowell County, Cir. 4, 227 F.2d 789 (1955), the Court of Appeals for this circuit, in referring to the administrative remedies provided for under the North Carolina statutes, had this to say:

> "An administrative remedy is thus provided by state law for persons who feel

that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51, 58 S.Ct. 459, 82 L.Ed. 638; Natural Gas Pipeline Co. of America v. Slattery, 302 U.S. 300, 310, 311, 58 S.Ct. 199, 82 L.Ed. 276; Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 172, 55 S.Ct. 7, 79 L.Ed. 259; United States v. Illinois Central R. Co., 291 U.S. 457, 463, 54 S.Ct. 471, 78 L.Ed. 909; P. F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 575, 54 S.Ct. 277, 78 L.Ed. 505; Porter v. Investors' Syndicate, 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226; Matthews v. Rodgers, 284 U.S. 521, 525-526, 52 S.Ct. 217, 76 L.Ed. 447; Prentis v. Atlantic Coast Line R. Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in Matthews v. Rodgers, supra (284 U.S. 525): 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

The same question was again discussed in Carson v. Warlick, Cir. 4, 238 F.2d 724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed. 2d 664. In this case, the late Chief Judge Parker, speaking for the court, stated:

"We think it clear that applicants are not entitled to the writ of mandamus which they ask, for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are not entitled to the relief which they seek in the court below until these administrative remedies have been exhausted. See 227 F.2d at page 790.

* * *

"It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy which it provides has not been invoked. It is argued that it is unconstitutional on its face in that it vests discretion in an administrative body without prescribing adequate standards for the exercise of the discretion. The standards are set forth in the second section of that act, G. S. § 115-177, and require the enrollment to be made 'so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils'. Surely the standards thus prescribed are not on their face insufficient to sustain the exercise of the administrative power conferred. As said in Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 145, 657, 61 S.Ct. 524, 533, 85 L.Ed. 624; 'The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.' The authority given the boards 'is of a fact-finding and administrative nature, and hence is lawfully conferred.' Sproles v. Binford, 286 U.S. 374, 397, 52 S.Ct. 581, 588, 76 L.Ed. 1167. See also

Douglas v. Noble, 261 U.S. 165, 169-170, 43 S.Ct. 303, 67 L.Ed. 590; Hall v. Geiger-Jones Co., 242 U.S. 539, 553-554, 37 S.Ct. 217, 61 L.Ed. 480; Mutual Film Corp. of Missouri v. Hodges, 236 U.S. 248, 35 S.Ct. 393, 59 L.Ed. 561; Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 245-246, 35 S.Ct. 387, 59 L.Ed. 552; Red 'C' Oil Mfg. Co. v. Board of Agriculture of North Carolina, 222 U.S. 380, 394, 32 S.Ct. 152, 56 L.Ed. 240.

"Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in Brown v. Board of Education, 349 U.S. 294, 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083:

" 'School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.'

* * *

"Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

* * *

"It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required."

Since there can be no question but that the plaintiffs here were required to exhaust their administrative remedies provided for under the State statutes, it becomes necessary to weigh the facts in this case against these statutory requirements.

[*Administrative Procedure*]

Section 115-176 through 115-179, General Statutes of North Carolina, provide for the administrative procedure to be followed in the enrollment and assignment of pupils in the public schools of North Carolina. Sec. 115-176 authorizes city and county boards of education to provide for the assignment to a public school of each child residing within the administrative unit, and authorizes each board of education to adopt reasonable rules and regulations relating to the assignment of pupils. Sec. 115-177 relates to the method of giving notice of assignment. No contention has been made in this case that the board of education was without authority to enroll the minor plaintiff or that proper notice of his assignment was not received. Sec. 115-178 prescribes the method for applying for reassignment, and a hearing before the board, in cases where the parents or guardian of any child are dissatisfied with the initial assignment made by the board of education. Sec. 115-179 relates to appeals to the state court from decisions of the board.

In view of the importance of Sec. 115-178, relating to applications for reassignments and hearings, same is quoted in full.

"Sec. 115-178. Application for reassignment; notice of disapproval; hearing before board.—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the reassignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted

by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a *hearing*, and shall be entitled to a *prompt and fair hearing* on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding *such hearing* and passing upon application for reassignment, and the decision of a majority of the members present at the *hearing* shall be the decision of the board. If, *at the hearing*, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail. (1955, c. 366, s. 3; 1956, Ex. Sess., c. 7, s. 3.)" (Emphasis supplied.)

Generally, under the provisions of Sec. 115-178, two steps seem to be required before a person dissatisfied with his assignment can be said to have exhausted his administrative remedies so as to permit him to apply to the federal courts for injunctive relief. The first step requires the filing of a written application with the board of education within 10 days after notification of the assignment. Such applications must be made on forms prescribed by the board of education and pursuant to rules and regulations adopted by the board. If the application for reassignment is disapproved, the board of education is required to give notice thereof to the applicant by registered mail. The second step requires the applicant, within five days after receipt of notice of disapproval of his written application, to apply to the board for a *hearing*. Provision is made for a prompt and fair hearing on the question of assignment of the child to a different school.

[*Plaintiffs' Compliance*]

There seems to be little question but that the plaintiffs have complied with the first step by timely filing a written application for reassignment on a form prescribed and furnished by the board, notwithstanding the contention of the defendant that the plaintiffs failed to comply with the first step when they refused to appear before the board for a hearing on their written application. In this regard, it should be borne in mind that the rules and regulations adopted by the board of education pursuant to Sec. 115-176 provides for notification to the parents of the child as to the time and place the written application will be heard, and also provides for receiving evidence and conducting the hearing in connection with the written application. The rules and regulations are silent in regard to the statutory provisions for a hearing in the event the written application for reassignment is disapproved. The question then arises as to whether or not the plaintiffs were within their rights in refusing to attend the August 6, 1957, meeting of the Board of Education after having been requested to do so. By letter dated July 17, 1957, plaintiffs' counsel advised the Board that plaintiffs would not attend this meeting for the reason that the Board's initial action on the application for reassignment was "purely ex parte". It would appear that plaintiffs' counsel was correct in this interpretation of the statute. If the General Assembly in the enactment of Sec. 115-178 contemplated a *hearing* in connection with the written application required under the first step referred to above, there would have been no necessity for the hearing provided for under the second step. Conceding that the plaintiffs were technically within their rights in refusing to attend the August 6 meeting for a hearing in connection with their written application, the question arises as to whether they should be excused for their failure to appear in person at the August 23, 1957, meeting, pursuant to the written request for a *hearing* filed with the Board of Education on August 9, 1957. The undisputed facts show that after the hearing had been requested by the adult plaintiffs, and the request had been granted by the Board of Education, and proper notice had been given of the time and place of the hearing, only plaintiffs' counsel appeared at the hearing with a petition and power of attorney. The petition only reviewed the previous action of the Board

and again requested that the change of assignment be made as originally requested. It is true that the Board did not make a second request for the personal appearance of the plaintiffs, but I think it is logical to assume that the Board was justified in feeling that such a request would be futile in view of the fact that the first request for a personal appearance had been declined.

[*Question Narrowed*]

It would then seem that the question of exhaustion of administrative remedies narrows itself down to the point of whether or not the plaintiffs adequately complied with the second step required under Sec. 115-178, when they failed to personally appear at the hearing on August 23. I conclude that they did not. Most of the Board members who testified at the trial stated that they in good faith desired to interview the minor plaintiff and his parents. It must be remembered that the written application for a change of assignment complained, in addition to racial discrimination and the difference in distance from plaintiffs' home to the two schools involved, that Broughton High School offered all the courses in which the minor plaintiff was interested and a fuller academic and extra-curricula program. Many of the Board members who testified at the trial stated that they were particularly interested in this phase of the complaint, as they had considered that Ligon High School was comparable in every respect, including the curricula offered, with the Broughton High School. It perhaps could logically be argued that these complaints were not necessary in order to entitle the minor plaintiff to reassignment, but the plaintiffs nevertheless saw fit to include these complaints in their application and it would seem that since the complaints had been made that the Board members had the right to discuss these complaints with the minor plaintiff and his parents. Further, the Board undoubtedly had the right to inquire into many other relevant and pertinent matters in order to gain sufficient information to enable it to make the findings required by statute.

It is clear that the state legislature contemplated something more than appearance by an attorney, and that plaintiffs' counsel recognized this fact when he wrote the Board of Education on July 17 that "as we read the Pupil Assignment Act, the Board's initial action on an application for reassignment is purely ex parte." It can reasonably be inferred that plaintiffs' counsel must have attached some significance to the second step which provides for a hearing. In other words, the plaintiffs elected to follow the statute rather than the rules and regulations promulgated by the Board, and having so elected they are required to substantially comply with its provisions. The plaintiffs cannot ignore the rules and regulations of the Board in regard to a hearing on the ground that they are not in harmony with the statute and, at the same time, ignore the statutory provisions.

[*Plaintiffs' Position*]

Counsel for the plaintiffs take two positions in their brief in regard to the failure of the plaintiffs to personally appear for the hearing. Their first contention is that it is for the plaintiffs to determine the type of hearing which they desire and its scope. This position is completely untenable since the board, in order to meet its fact finding responsibility under the statute, is entitled to have the plaintiffs show, through a personal appearance, their reasons for seeking reassignment and to answer relevant questions. The statute, Sec. 115-178, makes the finding that . . . "the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled. . .". Such findings must be based on some type of evidence, and certainly the Board is entitled to interrogate the applicants for reassignment in regard to these and other relevant factors. This is not to infer, however, that the Board is permitted to consider the race of the applicant in making these findings, since it is well settled that school children have the right "to be admitted to the schools of North Carolina without discrimination on the ground of race." Carson v. Warlick, supra.

[*Effect of Custom*]

Another contention made by the plaintiffs in regard to their refusal to appear before the Board is that, because of the alleged "custom, practice and usage" which the defendants pursued in operating its schools on a racially segregated basis, and its commitment to a continuation of those policies as shown in the rules

and regulations adopted in May, 1957, the plaintiffs were not required to pursue their administrative remedies beyond the filing of the written application. The position is likewise completely without merit. As pointed out above, the Court of Appeals for this circuit, in Carson v. Board of Education, Supra, and Carson v. Warlick, Supra, has held that an exhaustion of administrative remedies under the North Carolina pupil assignment law is a prerequisite to asking the federal courts for relief.

While, as is stated in Carson v. Warlick, the ". . . courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, ..." it is equally true that citizens, before seeking relief in the federal courts are likewise required to substantially comply with the standards of conduct prescribed for them. Mutual good faith on the part of the state and its citizens is required.

It might well be observed in passing that while school boards, in meeting their responsibility and observing the standards prescribed by the legislature, may prescribe reasonable rules and regulations for filing applications and conducting hearings under Sec. 115-178, such rules and regulations must be reasonable and must not be inconsistent with the Assignment and Enrollment of Pupils Act. Rules and regulations which are unreasonable, or which are inconsistent with this act, or which can reasonably be said to have been designed to create confusion rather than enlightenment, or which prescribe unreal or technical standards, should be disregarded by the court. Due consideration has been given to the fact that the Board of Education in this case adopted rules and regulations that combined both administrative steps into one, and in this regard do not conform to the provisions of Sec. 115-178. However, this becomes insignificant in this case in light of the fact that the plaintiffs recognized that the Board had exceeded its authority in combining both administrative steps into one and refused to appear at the proposed hearing based on the written application. Having elected to follow the statute rather than the rules and regulations promulgated by the Board, they were bound, in good faith, to comply with the statute and make a personal appearance at the hearing which was requested by them and granted by the Board.

[*Statute Explicit*]

The statute under which the plaintiffs elected to pursue their administrative remedies contains every requirement of a formal hearing of a quasi judicial character, with evidence produced and findings made.

The term "hearing" has been defined in numerous cases. Frequently, as in other matters, the construction depends on the type of hearing contemplated. For example, hearings for the purpose of determining motions based on legal conclusions to be drawn from admitted facts do not generally require the presence of the parties, but most of the authorities seem to hold that where facts are to be determined on the basis of hearings before administrative agencies, the personal appearance of witnesses is necessary. In Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936), the Supreme Court of the United States, in considering a rate order made by the Secretary of Agriculture under the Packers and Stockyards Act of 1921, stated:

> "There must be full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & S. R. Co., supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order ****
>
> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion

uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. ****

"**** But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, which the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

In Feeney v. Willard, 129 F.Supp. 414, 417 (D.C. S.D.N.Y., 1955), a hearing is defined as follows:

. . ." 'Hearing' is a term of art in administrative proceedings, and if it is to have any significance it must be in connection with a determination of issues. Hearings provide the basis for determinations, and an opportunity to be heard is an opportunity to influence decision. . ."

In Bowles v. Baer, 7 Cir., 142 F.2d 787 (1944) the Court of Appeals for the Seventh Circuit explained the difference between an investigation and a hearing, and as to a hearing the Court said:

"On the other hand, in a hearing there are parties, and issues of law and of fact to be tried, and at the conclusion of the hearing, action is taken which may materially affect the rights of the parties."

The Court must give some weight to the terms "for a hearing," "a prompt and fair hearing" and "such hearing", as used in Sec. 115-178, unless these terms are to be rendered meaningless. If the written application is all that is needed, then the provision for a hearing would be totally without meaning. The basic constitutionality of this statute has been upheld by the Court of Appeals for this circuit, and I am of the opinion that a substantial and good faith compliance with all administrative remedies is required before a plaintiff is entitled to be heard in a court of equity.

When the conduct of the plaintiffs in this case is weighed against the background of the provisions of the state statutes relating to administrative remedies, it must be concluded that there has been no adequate exhaustion of administrative remedies and that, until after there has been an exhaustion of those remedies, the plaintiffs cannot be heard to complain in a court of equity.

[*State Interpretation*]

And finally, a word about the contentions of the defendant that the matter of interpretation of the meaning of the North Carolina Assignment and Enrollment of Pupils Act, as it applies to this particular case, should first be determined by the North Carolina courts, and that an appeal to the Superior Court of North Carolina, as provided by Sec. 115-179, is a part of the administrative remedy and should be exhausted before appeal to the federal courts. Both of these contentions are effectively answered against the defendant by the late Chief Judge Parker in Carson v. Warlick, Supra, where he said:

"It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. Lane v. Wilson, 307 U.S. 268, 274, 59 S.Ct. 872, L.Ed. 1281. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending."

The defendant further urges that, notwithstanding the holding of the Court of Appeals in the Carson case, this court should, under the doctrine of "equitable abstention," in an

equitable action of this type, and in the exercise of sound discretion, withhold a decision in this case until the Attorney General can institute an action in the State Court for declaratory judgment or other appropriate remedy whereby the Assignment and Enrollment of Pupils Act can be construed by the North Carolina Supreme Court. While a number of cases are cited in support of this contention, I do not believe these cases are applicable to the type of case here involved and, in any event, do not feel justified in exercising my discretion in the manner urged by the defendant.

II

WHETHER THE MINOR PLAINTIFF WAS REFUSED REASSIGNMENT TO THE BROUGHTON HIGH SCHOOL ON ACCOUNT OF HIS RACE.

In view of the conclusion I have reached in regard to the exhaustion of administrative remedies, it is unnecessary to discuss the reason why the Board of Education denied the minor plaintiff admission to the Broughton High School. There is no way the Court can anticipate what the action of the Board might have been had the plaintiffs pursued the administrative remedies afforded by law by personally appearing before the Board for a hearing. Pure speculation on my part would serve no useful purpose. The plaintiffs are not entitled to have this proposition passed upon until their administrative remedies have been exhausted. This seems to be the conclusion reached in National Lawyers Guild v. Brownell, Cir. D.C. 225 F.2d 552, 555 (1955), where the court said:

> "We cannot assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it."

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The plaintiffs failed to exhaust their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act prior to the institution of this suit.

3. The plaintiffs are not entitled to the relief prayed for.

A judgment will be entered in conformity with this opinion unless the plaintiffs file a written motion within ten days requesting that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies.

This the 29th day of August, 1958.

DECREE

STANLEY, District Judge:

The above cause came on to be heard before the undersigned District Judge before the Court without a jury on July 14 and 15, 1958, and the Court having considered the evidence and the arguments of counsel for both sides and of the Attorney General of North Carolina, appearing Amicus Curiae, and having entered a memorandum Opinion including Findings of Fact and Conclusions of Law under date of August 29, 1958, and having directed that decree be entered in accordance with said Opinion and it having been concluded therein as follows:

> "1. The Court has jurisdiction of the parties and the subject matter herein.
>
> "2. The plaintiffs failed to exhaust their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act prior to the institution of this suit.
>
> "3. The plaintiffs are not entitled to the relief prayed for.
>
> "A judgment will be entered in conformity with this opinion unless the plaintiffs file a written motion within ten days requesting that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies."

And it further appearing to the Court that the time having expired within which plaintiffs were allowed to file a written motion to request that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies as set forth in the concluding paragraph of said Opinion, and the Court having been further advised by letter from plaintiffs' counsel that no such motion would be filed;

Now, Therefore, it is ORDERED, ADJUDGED and DECREED that this action be and the same is hereby dismissed and that the

prayer of the plaintiffs for relief be and the same is hereby denied.

It is further ORDERED, ADJUDGED and DECREED that the parties hereto will bear their own costs of Court incurred herein.

Done this 17th day of September, 1958.

EDUCATION
Public Schools—Virginia (Arlington)

County SCHOOL BOARD OF ARLINGTON COUNTY, Virginia et al. v. Clarrissa S. THOMPSON, et al.

United States District Court, Eastern District, Virginia, September 17, 1958, Civil No. 1341.

SUMMARY: In a class action in federal district court, Negro school children in Arlington County, Virginia, obtained an injunction against school officials requiring their admission to schools without discrimination on the basis of race. 144 F.Supp. 239, 1 Race Rel. L. Rep. 890 (E.D. Va. 1956). On appeal, the Court of Appeals for the Fourth Circuit affirmed, holding, in part, that the Virginia Pupil Placement Act (1 Race Rel. L. Rep. 58 1109) was inapplicable in the case. 240 F.2d 59, 2 Race Rel. L. Rep. 59 (1956); *cert. denied*, 353 U.S. 910, 2 Race Rel. L. Rep. 300 (1957). A motion was then made to the district court to amend the decree, which had required the removal of discrimination by January, 1957, for elementary students and September, 1957, for junior and senior high schools. The school officials also moved to have the decree suspended pending a ruling by the Supreme Court on another case involving the constitutionality of the Pupil Placement Act. The court amended the decree so as to require admission of all school children on a racially non-discriminatory basis beginning in September, 1957, but declined to suspend the operation of the injunction. 2 Race Rel. L. Rep. 810 (1957). Thereafter seven Negro pupils were denied admission to previously "white" schools because they had failed to apply to the state Pupil Placement Board for transfer. The Negroes then moved for further relief and for enforcement of the court's order. The court directed admission to the schools applied for by September 23, 1957, stating that the admission of the pupils to public schools could not be denied on the basis of a failure to comply with the Pupil Placement Act. The injunction was, however, suspended pending appeal. —— F.Supp. ——, 2 Race Rel. L. Rep. 987 (E.D.Va., 1957). On appeal, the Court of Appeals for the Fourth Circuit affirmed, stating that the order was "clearly proper" —— F.2d——, 3 Race Rel. L. Rep. 188. This decision came too late, however, to affect the 1957-58 school term. In the summer of 1958, 30 Negro students sought transfer to "white" schools. The state Pupil Placement Board denied all the transfers, citing various provisions of the placement act, the federal district court reviewed this action and found that in 26 of the cases, it could not be said the transfers were refused without substantial supporting evidence. However, in four other cases, there was no evidence found to support a refusal to transfer, and admission was ordered. Because the school term had already started, the court delayed the effective date of the order until mid-term.

FINDINGS OF FACT
CONCLUSIONS OF LAW

BRYAN, District Judge

Now, for the first time, this case comes before the court upon an assignment of pupils made by State and local authorities and founded on local conditions. Decision is reduced to an administrative review. The case signally demonstrates the soundness and workability of these propositions: (1) that the Federal requirement of avoiding racial exclusiveness in the public schools—loosely termed the requirement of integration—can be fulfilled reasonably and with justice if the guide adopted is the circumstances of each child, individually and relatively; (2) that it may be achieved through the pursuit of

any method wherein the regulatory body can, and does, act after a fair hearing and upon evidence; and (3) that when a conclusion is so reached in good faith, without influence of race, though it be erroneous, the assignment is no longer a concern of the United States courts.

In this court's 1956 opinion, referring to the right of the pupils to seek enforcement of the injunction, these same propositions were suggested. But in 1957 no ground whatsoever was tendered for such considerations. The opinion then commented, ". . . we have no administrative decision with which to commence, save in one instance". Now the premises are offered.

Weighing these, the court cannot say that as to twenty-six of the thirty pupil-plaintiffs their applications for transfer to "white" schools were refused without substantial supporting evidence. As to the remaining four, refusal of their applications for transfer is not justified in the evidence. They are Ronald Deskins, Michael Gerard Jones, Lance Dwight Newman and Gloria Delores Thompson.

[*Unwise To Transfer*]

These four are all applicants for Stratford Junior High School; they have asked to enter the seventh grade, the first year of junior high. Before this decision can be effectuated by a final decree, ten days or more would routinely elapse, carrying the effective date into October. In the judgment of the court it would be unwise to make the transfers as late as that in the term. The decree, therefore, will be made effective at the commencement of the next semester, January, 1959. This short deferment will not be hurtful. Indeed, if the basic problem can be solved by time, the price is not too dear.

I. The evidence upon which the assignments were made was taken subject to several motions and these should be passed upon before the evidence is considered. Counsel for the Pupil Placement Board, appearing in association with the attorneys for the defendants, has moved the court to dismiss the entire proceeding on the ground that his client is an indispensable party to an action of this kind and has never been brought into the case. He relies on the Pupil Placement Act of Virginia, 1958 Acts of the General Assembly, c. 500, 1950 Code of Virginia, as amended, 22-232.1, supplementing the 1956 Pupil Placement Act. This legislation purportedly vests in the Pupil Placement Board, exclusively, all authority to determine the school to which any child shall be admitted. It is argued that as the present action involves the admission of the plaintiff-pupils into the schools, the Board should be a party. The motion must be denied.

While the Pupil Placement Act has been amended, since the 1957 holding of this court that the procedure there stipulated was not an adequate administrative remedy, it is still not expeditious. The student would be too far delayed into the session before his application would be finally determined. Then, at the end, the school closing and fund-cut-off statutes automatically shut the school, and withhold any money for its operation, should the student be assigned to a school then teaching children of the other race. Acts of the General Assembly of Virginia, 1956, Ex. Session c. 68, 1950 Va. Code, as amended, 22-188.5; Acts, 1958, c. 642, Item 129 (Appropriations for schools).

It may be, however, that the first stage prescribed in the Act is adoptable—some State or local authority must process the applications and make the assignments—but the point is moot. The applications in suit were considered by the Placement Board and the Arlington County School Board together. The results, the refusals to grant the transfers, were in effect assignments. There is no reason to decide now whether this was Placement Board or School Board action.

[*Goes to Local Officials*]

Nevertheless, in no event need the Placement Board be impleaded here. The impact of any decree would be upon the persons immediately in charge of the schools. They it is who actually admit or reject the students. Ordinarily they would be the employees of the School Board, such as the principals and the teachers. From the fact that the School Board and its employees may be controlled in their acceptance of students by the Pupil Placement Board, it does not follow that the court cannot judge the validity of such regulations without having the Placement Board before it.

The plaintiffs move to strike from the evidence the findings of the Director of Psychological Services of the Virginia State Department of Mental Hygiene in regard to the psychological problems of certain of the applicants. It is conceded that the School Board or the Place-

ment Board had the right to consider this report. The objection is that in trial it is hearsay, because the Director was not called as a witness. So far, the motion is good. However, it does not preclude the court from considering the report in measuring the evidence that was before the Boards.

II. By the assignments of the Boards, thirty Arlington County Negro pupils have been refused transfer from the previously all-Negro schools to several previously all-white schools. The assignments were the result of a screening of the pupils against criteria of five categories designated as: Attendance Area, Over-crowding at Washington and Lee High School, Academic Accomplishment, Psychological Problems, and Adaptability. Five of the thirty are the children who were ordered admitted by this court in September 1957, but the order was stayed pending appeals. Contrary to their argument, however, these pupils have not by virtue of that order a vested position for this session. Admissions must be judged on current conditions, the rule to be applied to all students. In this discussion the children will be designated according to the letters and numbers used in the trial.

A: Attendance Area—Pupils 2, 3, 4, 9, 14, 15, 17, 18, 23, 24 and 25

On the Attendance Area test eleven transfers were declined—students Nos. 2, 3, 4, 9, 14, 15, 17, 18, 23, 24 and 25. With the slight exceptions hereinafter noted, the school districts have remained the same since the lines were fixed long prior to the Supreme Court's decision of May 17, 1954. These pupils have been attending the Hoffman-Boston School. It has been housing elementary grades, as well as both junior and senior high schools, but solely for Negroes. The Hoffman-Boston lines were originally drawn to embrace an area occupied almost entirely by Negroes. In fact, save for a very small area known as the north Hoffman-Boston district, it is the only Negro residential section in the County. These eleven pupils (2, 3, 15 and 25 being senior high school students and 4, 9, 14, 17, 18, 23 and 24 junior high school students) live in the Hoffman-Boston area.

There is no other high school, white or colored, nearer to them than Hoffman-Boston. Nos. 2, 3, 15 and 25 applied for admission to Wakefield High School. Among other adjustments this change would mean the establishment of a new bus route and would mean a longer haul than the bus ride now afforded them to Hoffman-Boston.

The others sought entry into either Kenmore Junior High School, Gunston or Thomas Jefferson. In distance all of these schools are slightly closer to their residences than Hoffman-Boston. However, the school authorities had other factors to consider, such as the adoption of presently established school bus routes, walking distances and the crossing of highways, as well as that Hoffman-Boston was but a twenty-minute bus ride for these pupils.

B: Academic Accomplishment Deficiency of These and Also B, C, D, E, 5, 6, 8, 10, 11, 12, 21 and 22

Excepting No. 18, all of the immediately considered pupils—2, 3, 4, 9, 14, 15, 17, 23, 24 and 25—were also refused transfer because of their academic standing. Besides these, pupils B, C, D, E, 5, 6, 8, 10, 11, 12, 21 and 22 were likewise found to be ineligible, on account of academic deficiency, for the transfers requested.

In making the academic determinations the California Achievement Test was the principal factor. Other factors were the school records and experience. While among these twenty-two pupils some were listed on their student report cards as making low scholastic averages, just about as many had high averages and others were "on grade level". Their intelligence quotients are not low. The school authorities do not deny these evaluations. But they emphasize that these standings are related only to the then grade and school of the children. The basis for refusual of the transfers was not those standings. The basis was that the scholastic standing in the classes to which they asked entry was above the individual standings of the applicants to the extent that the transfers could not be justified under sound educational principles.

The median achievement level in the schools to which entrance is sought, the evidence shows, is appreciably higher than the national norm. On the other hand, the median of the schools from which the applicants would come, is more than a year below this norm. Moreover, in the schools applied for, two-thirds of the pupils have achievement ratings above the national norm; while in the schools of origin, four-fifths of the students are well below the national norm. So a transfer might result in placing the pupil in

an achievement group one or more years above the achievement category of his present group.

With the exception of pupil 18, all of the applicants now in discussion—2, 3, 4, 9, 14, 15, 17, 23, 24, 25, B, C, D, E, 5, 6, 8, 10, 11, 12, 21 and 22, totaling twenty-two—were below the median achievement of the ad-schools. Fifteen—22, 11, 14, 24, E, C, 10, 5, 8, 25, 15, D, 21, 12, 3—of them were below the national norm. Two of them were three years below and five others as much as a year or more. It must be remembered, though, that some of the ad-school students are also below the national norm. In the table of average mental maturity, grade for grade, the Hoffman-Boston is shown to be more than fifteen points under the other schools, the one about 90 and the other 105 plus.

C: Psychological Problems—Pupils C, 1, 2, 6, 8, 21 and 24

Seven applications were declined because of psychological problems. Of these seven, six—C, 2, 6, 8, 21 and 24—were among those just noted as rejected for academic deficiency. No. 1 was not in that group. For this classification the Boards chiefly relied upon the conclusions of the State Director of Psychological Services. Of course, the school records of these children were also at hand. In substance, the opinion of the Director was that "it would be unwise and possibly harmful to this child to subject him to the pressures which might result from attending a school" having children of a different or another race. Instability, lack of self-control, extreme shyness and difficulty of mingling or making friends are the circumstances generally named by him for his conclusions, persuading him that entry into such a school would result in severe difficulty in the schools as well as to the subject pupil. Thus the Director's determinations do involve race.

D: Overcrowding at Washington and Lee—Pupils D, 1, 12, 19 and 21

For senior high school attendance allocations, Arlington County has been for many years divided into three districts. The Washington and Lee District, taking the name from the high school located in the north center of the County, originally embraced approximately the north half of the county. The second district is Wakefield, named for another high school situated on the extreme western boundary of the county and in the southwest section. The third district is Hoffman-Boston, already described, and forming an enclave within the Wakefield District.

Before the commencement of this litigation and without anticipation of it, a large area in the northwest corner of the County was taken out of the Washington and Lee District, because of the over-population of that high school. The severed area is not contiguous to but well north of the line between the Washington-Lee and the Wakefield districts. Since the inception of the present controversy the northern district of Hoffman-Boston has been vacated. It was entirely surrounded by Washington-Lee District; hence it is now thrown into that district. This small territory is contiguous to that part of Washington and Lee just described as taken off from the latter. Pupils D, 1, 12, 19 and 21 reside within the territory formerly comprising the northern district of Hoffman-Boston. They have been assigned to the Hoffman-Boston High School.

[*Nearer To Residences*]

Washington and Lee High School is much nearer to their residences than is Hoffman-Boston. Indeed, it lies between the residences and Hoffman-Boston, away from the residences about one-fourth of the total distance. Overcrowding of Washington and Lee is the basis for the assignment of these pupils to Hoffman-Boston.

Before the necessity arose for considering the assignment of senior high school pupils residing in the former northern Hoffman-Boston District to any high school other than Hoffman-Boston, the Washington and Lee High School had become congested. The present population is 2600 as against a maximum capacity of 2000. At Hoffman-Boston, the current population is 575, with a capacity of 375, augmented now by four temporary classrooms accommodating 100 more pupils and to be increased, further, by the addition of five classrooms now under construction, for completion in January 1959, to care for 125 pupils. The total facilities at Hoffman-Boston will thus be 600. Wakefield is constructed for 2000 but presently has 2540 students.

In maintaining the assignment of these students to Hoffman-Boston, rather than to Washington-Lee, the defendants referred to corresponding treatment of Caucasian pupils. They

point to the students living in the territory severed from Washington-Lee. These white pupils in the tenth grade (the first year of the senior high school) must go to Wakefield High School. This is a distance as great, if not greater, than the trip to Hoffman-Boston from its former northern district. They note still another comparable transportation of white students. Those living at Fort Myer, in the southeast part of the county, are not permitted to go to the nearer Washington-Lee High School but are required to attend Wakefield, on the other side of the county. The Hoffman-Boston School is superior to any of the other schools in the county in its 18.5 pupil-teacher ratio.

E: Adaptability—Pupils A, 7, 13, 16 and 20

Thus, eighteen of the thirty applicants have been found disqualified upon at least two, and sometimes three, of the criteria, and seven for the sole reason of overcrowding, attendance area, or academic standing. The remaining five applicants—A, 7, 13, 16 and 20—were refused transfer for failing the test of Adaptability.

On this last criterion the principal witness was the Superintendent of Schools. With thirty-two years in segregated schools, his experience covers both Negroes and Caucasians, though separately. He defines Adaptability as including the ability to accept or conform to new and different education environment. In reference to these five pupils he readily concedes that their places of residence would entitle them to go to the schools of their application—Pupil A to Patrick Henry Elementary School, and 7, 13, 16 and 20 to Stratford Junior High School.

But the point made by the Superintendent is that these students would, respectively, be injured by placement in Patrick Henry or in Stratford Junior High School. His reason is that they would lose their present position of school superiority and leadership. At Hoffman-Boston 7, 13, 16 and 20 rate about two years above the school norm of achievement. They are nearly a year ahead of the national norm. However, if they enter Stratford, they will not, as they are in Hoffman-Boston, be in the top group, but just above the achievement median of that school. They will not be among the leaders. Analagous reasoning is applied to A at Patrick Henry. The Superintendent feels that this would be discouraging and possibly emotionally disturbing to them. Race or color is not the basis for his opinion, though, he owns, the necessity for his decision is occasioned by the removal of racial bars.

CONCLUSION

1. The very formulation and use of the criteria is pleaded by the plaintiffs as racial discrimination. With this the court disagrees. True, previously no such tests were known; they came into being in the latter part of August 1958 in connection with the instant school assignments. But this does not prove discrimination.

These tests were not used previously because there was no necessity. The removal of the rule and custom of segregation was an abrupt change. It was a social epoch, beginning a new era. Accommodation to its demands meant new methods as well as facilities. The assignment of pupils took on an added obligation. At some time and place, assignment regulations had to be adopted. Therefore, the instant criteria are not discriminatory as born of a social change. Otherwise, after the erasure of race as a factor in pupil placement, no assignment plan could ever be validly adopted.

2. This recital of the evidence is not written with the implication that the evidence as to the tests was not questioned. In refutation the plaintiffs offered evidence of considerable weight and relevance. But the court does not in a case of this kind resolve such differences. It examines the conflicting evidence only to see if the rebuttal evidence destroys any weight that might be given to the defendants' proof. Its inquiry is to ascertain if the defendants' evidence, independently of influence of race or color, was sufficient to sustain the action of the Placement Board and the School Board.

3. The reasons given for disqualifying the seven students upon the test of the Psychological Problems obviously give consideration to race and color. On the other hand, the rejection was not due solely to these features. The court, however, does not rule on the weight to be accorded this test because the evidence before it upon the point is too scant. The psychologist was not called as a witness and the court does not have the benefit of his exposition. Therefore, this test must be disregarded for this case.

4. Plaintiffs urge that invalidity of the assignments is conclusively established by the result, that is, that all Negro pupils remain in

the Hoffman-Boston School. Though plausible, the argument is not sound. Actually, the principal reason for the result is the geographical location of the residences of the plaintiffs, indeed of the entire Negro population in Arlington County. It is confined to two sections, the Hoffman-Boston area and the previous, small northern division of the Hoffman-Boston, several miles apart. Hoffman-Boston is by far the larger Negro area. This situation seemingly would be frequently found in areas, like Arlington County, urban in character.

It occurs, too, from the relatively small Negro population in the County. The condition now does not differ greatly from that noted in this court's opinion of September 1957. Then there were 1432 Negroes in all of the County's schools. This compared to some 21,000 white students. The latter are scattered throughout the County. The concentration of Negro population is confirmed in this case by the fact that only one white-school parent was available to testify as a resident of Hoffman-Boston district.

Nor is discrimination proved by the stipulation that 100 Negro pupils are transported to Hoffman-Boston from the now dissolved northern division of Hoffman-Boston. As many as 250 white pupils are carried from the severed portion of Washington-Lee District to Wakefield. Only eighteen of these Negroes are complainants here. They are D, 1, 12, 19, 21, B, C, E, 5, 6, 7, 8, 10, 11, 13, 16, 20 and 22. Without ignoring the record and without presuming bad faith in the Boards, it cannot be said that they were sent to Hoffman-Boston simply to segregate the Negro children. For example, D, 1, 12, 19 and 21 were sent specifically because of the overcrowding at Washington and Lee. Either these or some other pupils, white or colored, had to be rejected at Washington-Lee. It was not illogical to turn away those who had more recently become eligible, in favor of those who were already in, or had studied for entrance into, Washington and Lee. Again, proof that the assignments to the Hoffman-Boston School were not arbitrary is seen in the specific finding in respect to B, C, D, E, 5, 6, 8, 10, 11, 12, 19, 20, 21 and 22—want of academic accomplishment.

5. The court is of the opinion that Attendance Area, Overcrowding at Washington and Lee, and Academic Accomplishment clearly are valid criteria, free of taint of race or color. It concludes also that these criteria have been applied without any such bias. It cannot say that the refusal of transfers on these grounds is not supported by adequate evidence.

The court may have made a different decision on this evidence; it may not agree with the conclusions of the Boards. But that is of no consequence once it is found that the administrative action is not arbitrary, capricious or illegal. Thus the denial of twenty-five of the applications must now be sustained.

6. The remaining five applications—A, 7, 13, 16 and 20—failed on the test of Adaptability. This is the most difficult criterion to evaluate. It is certainly not frivolous, especially when it is the opinion of an educator of thirty-two years experience. In certain circumstances, undoubtedly, the line of demarcation between it and racial discrimination can be so clearly drawn, that it can be the foundation for withholding a transfer. Pupil A exemplifies this hypothesis.

Ten or eleven years old, with an academic achievement "on a grade level", this boy wishes to transfer from Hoffman-Boston Elementary School to Patrick Henry, also elementary. The latter is nearer his residence than is Hoffman-Boston. But he leaves a school with lowest of all pupil-teacher ratio. His only advantage is one of distance; in good weather and subject to pedestrian traffic dangers, he could walk to Patrick Henry, about a half mile away, while the school bus would take him to Hoffman-Boston, 1.2 miles off, in perhaps less than his walking time.

The median of academic achievement for his grade at Hoffman-Boston is 3.9. As he is "on grade level" this would indicate his standing. In Patrick Henry the same median is 6.0. The average mental maturity for the fifth grade in Hoffman-Boston is 87, while in Patrick Henry it is 113, a difference of twenty-six. Laying aside the physical circumstances, the court cannot say that Adaptability, in view of the intelligence factors, is a capricious standard when applied to A. His transition could well be discouraging, if not disparaging, one from which a student may be lawfully saved by the judgment of the more experienced.

The circumstances of 7, 13, 16 and 20 are different from A's. They live in the former northern district of Hoffman-Boston; their homes are near Stratford Junior High School and within its

region. Each of them stands above the median achievement score of Stratford. They have a common age of twelve years and they all would enter the first year of junior high school. They are a group formerly attending Langston Elementary School together, presumably friends having common interests.

In these circumstances, having in mind also their relative academic standing, Adaptability could hardly bar them. The court finds no ground in the record to uphold the Boards' refusal of the transfers of 7, 13, 16 and 20—Ronald Deskins, Michael Gerard Jones, Lance Dwight Newman and Gloria Delores Thompson.

COLOPHON

The length and detail of this statement were necessary to assure care and solicitude for the actions of State and local administrative agencies. It is an effort, too, to establish for cases of this character some design for decision.

EDUCATION
Public Schools—Virginia (Charlottesville)

Doris Marie ALLEN, etc., et al., v. The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, etc., et al.

United States District Court, Western District, Virginia, Civil Action No. 51.

SUMMARY: Negro school children in Charlottesville, Virginia, filed class actions seeking admission to white schools. An injunction was issued in federal district court forbidding discrimination. This was affirmed by the Court of Appeals for the Fourth Circuit, and the United States Supreme Court denied certiorari. 240 F.2d 59, 353 U.S. 910, 1 Race Rel. L. Rep. 886, 986, 2 Race Rel. L. Rep. 300. On September 9, 1958, the district court held hearings on a motion by Negro plaintiffs seeking an injunction ordering their immediate admission. On September 13, the court signed an order requiring the admission of 12 named plaintiffs. The Court of Appeals for the Fourth Circuit on September 16 refused to stay the effective date of the injunction. On September 19, the governor of Virginia announced state control of the schools, and ordered them closed. A move was then started in the city to operate private schools with city-paid teachers. On motion of the Negro plaintiffs, the district court on October 9 enjoined payments of such teachers from public funds. The injunctions of September 13 and October 9 are reproduced below. The governor's closing order of September 19 is identical to that in the *Warren* Case, p. 972, *infra*.

ORDER (September 13)

PAUL, District Judge.

This action, which had been previously continued by order of the court entered on August 11, 1958, came on to be heard on September 8 and 9, 1958, upon the motion of plaintiffs praying that the defendants be specifically directed to admit them to the schools to which they have applied for admission for the school session of 1958-59, upon the motion of the defendants to dismiss the said motion, upon the motion of Special Counsel for the Virginia Pupil Placement Board to dismiss the defendants on the ground that they had no power and authority to admit or enroll pupils in the public schools of the City of Charlottesville, and upon the motion of the defendants praying that any order entered in this action pertaining to the admission and enrollment of Negro pupils in Lane High School should not be made effective prior to the 1959-60 school session.

Upon consideration of the evidence and arguments of counsel for all the parties on the said motions, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants and employees admit and enroll certain plaintiffs in the schools to which they have made application for admission, to-wit:

1. Charles Everett Alexander in the 1st grade of the Venable Elementary School;
2. Regina Carroll Dixon in the 1st grade of the Venable Elementary School;
3. William R. Townsend in the 1st grade of the Venable Elementary School;
4. Raymond LaVere Dixon in the 2nd grade of the Venable Elementary School;
5. Sandra L. Wicks in the 3rd grade of the Venable Elementary School;
6. Marvin L. Townsend in the 6th grade of the Venable Elementary School;
7. Roland T. Woodfolk in the 6th grade of the Venable Elementary School;
8. Ronald E. Woodfolk in the 6th grade of the Venable Elementary School;
9. Judy Ann Saunders in the 7th grade of the Venable Elementary School;
10. H. Bryant Mitchell, Jr., in the 7th grade of the Venable Elementary School;
11. Olivia L. Ferguson in the 12th grade of the Lane High School; and
12. John J. Martin in the 9th grade of the Lane High School.

It is furthered ORDERED that the motion of the remaining plaintiffs for admission to the schools to which they respectively applied is denied, to which action counsel for said plaintiffs except.

It is further ORDERED that the motion of the defendants to dismiss the motion for further relief, the motion of the Special Counsel for the Virginia Pupil Placement Board to dismiss the defendants for the reason aforesaid and the motion of the defendants to postpone the operation of the effective date of this order as it may affect Lane High School are denied, to which action of the court counsel for the defendants and Special Counsel for the Virginia Pupil Placement Board except.

It is further ORDERED that this action remain upon the docket of the Court and that the Court retain jurisdiction of the same for such future action, if any, as may be necessary therein.

ORDER (October 9)

PAUL, J.

Upon consideration of the motion filed herein to intervene additional parties plaintiff, it appearing that defendants do not object thereto, and upon consideration of plaintiffs' motion for further relief filed herein on October 4, 1958, it is by the Court this 9th day of October, 1958, ADJUDGED, ORDERED AND DECREED

1. That the motion to intervene additional parties plaintiff be and it is hereby granted.

2. That the defendants, their agents, servants or successors be and they are hereby restrained and enjoined until the further order of this Court from permitting or allowing their employees, while being paid out of public funds, their facilities, or their equipment to be used in the education or instruction of pupils eligible for admission, enrollment or education in the Charlottesville Schools, unless such instruction or education is afforded to plaintiffs on a racial nondiscriminatory basis in compliance with this Court's previous orders herein.

3. That this order be and become effective as of Wednesday, 15th October 1958.

EDUCATION
Public Schools—Virginia (Newport News)

Sharon ADKINSON, et al., etc., v. The SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, etc.

United States District Court, Eastern District, Virginia, Civil No. ———.

SUMMARY: Negro school children in Newport News, Virginia, filed suit in federal district court asking for a temporary injunction restraining the school board from denying their admission to white schools. The suit also asks that the school board be required to submit an overall desegregation plan. A desegregation order previously had been issued against Newport News (see *Atkins v. School Board of Newport News*, 148 F.Supp. 430, 246 F.2d 325, 78 S.Ct.

77, 2 Race Rel. L. Rep. 46, 334, 808, 1097), but the subsequent merger of the city of Newport News with the neighboring city of Warwick had confused the issue. At a hearing on September 7, the court, Hoffman, J., refused the temporary injunction because the school term had already started, and set the case for hearing on its merits. Reproduced below are the complaint and motion for temporary injunction.

COMPLAINT

1. (a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under Article 1, Section 8, and the Fourteenth Amendment of the Constitution of the United States, Section 1, and under the Act of Congress, Revised Statutes, Section 1977, derived from the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), as hereafter more fully appears. The matter in controversy, exclusive of interest and cost, exceeds the sum of Ten Thousand Dollars ($10,000.00).

(b) Jurisdiction is further invoked under Title 28, United States Code, Section 1343. This action is authorized by the Act of Congress, Revised Statutes, Section 1979, derived from the Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13 (Title 42, United States Code, Section 1983), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States and by the Act of Congress, Revised Statutes, Section 1977, derived from the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States as hereafter more fully appears.

2. Infant plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the City of Newport News, Virginia. They are within the statutory age limits of eligibility to attend the public schools of said City, and possess all qualifications and satisfy all requirements for admission thereto, and are in fact attending public schools of said City operated by defendants.

3. Adult plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the City of Newport News, Virginia. They are parents or guardians of the infant plaintiffs, and are taxpayers of the United States and of said Commonwealth and City. All adult plaintiffs having control or charge of any unexempted child who has reached the seventh birthday and has not passed the sixteenth birthday are required to send said child to attend school or receive instruction (Code of Virginia, 1950, Title 22, Chapter 12, Article 4, Sections 22-251 to 22-256).

4. Plaintiffs bring this action in their own behalf and, there being common questions of law and fact affecting the rights of all other Negro children attending the public schools in the City of Newport News, Virginia, and their respective parents and guardians, similarly situated and affected with reference to the matters here involved, who are so numerous as to make it impracticable to bring all before the Court, and a common relief being sought, as will hereinafter more fully appear, bring this action pursuant to Rule 23 (a) of the Federal Rules of Civil Procedure, as a class action, also on behalf of all other Negro children attending the public schools in the City of Newport News, Virginia, and their respective parents and guardians, similarly situated and affected with reference to the matters here involved.

5. Defendant, The School Board of the City of Newport News, Virginia, exists pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative department of the Commonwealth of Virginia discharging governmental functions (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-2, 22-5 to 22-9.3, Chapter 6, Article 1, Sections 22-45 to 22-58, Chapter 6, Article 4, Sections 22-89 to 22-99, Chapters 7 to 15, Sections 22-101 to 22-166, 22-188.3 to 22-210, 22-212 to 22-246, 22-248 to 22-277, 22-279, 22-282 to 22-330); and is declared by law to be a body corporate (Code of Virginia, 1950, Chapter 6, Article 4, Section 22-94.

6. Defendant, R. O. Nelson, is Division Superintendent of Schools for the City of Newport News, Virginia. He holds office pursuant to the

Constitution and laws of the Commonwealth of Virginia as an administrative officer of the public free school system of Virginia (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-2, 22-5 to 22-9.3, Chapter 4, Sections 22-31 to 22-40, Chapters 6 to 15, Sections 22-45 to 22-55, 22-57 to 22-83, 22-89 to 22-166, 22-188.3 to 22-210, 22-212 to 22-246, 22-248 to 22-277, 22-279, 22-282 to 22-330). He is under the authority, supervision and control of, and acts pursuant to, the orders, policies, practices, customs and usages of defendant, The School Board of the City of Newport News, Virginia. He is made a defendant herein in his official capacity.

7. The Commonwealth of Virginia has declared public education a state function. The Constitution of Virginia, Article IX, Section 129, provides:

> "Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

Pursuant to this mandate, the General Assembly of Virginia has established a system of public free schools in the Commonwealth of Virginia according to a plan set out in Title 22, Chapters 1 to 15, inclusive, of the Code of Virginia of 1950. The establishment, maintenance and administration of the public school system of Virginia is vested in a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County, City and Town School Boards (Constitution of Virginia, Article IX, Sections 130-133; Code of Virginia, 1950, Title 22, Chapter 1, Section 22-2).

8. The public schools of the City of Newport News, Virginia, are under the control and supervision of defendants, acting as an administrative department or division of the Commonwealth of Virginia (Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-2). Defendant, The School Board of the City of Newport News, Virginia, is empowered and required to establish and maintain an efficient system of public free schools in said City (Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-5); to provide suitable and proper school buildings, furniture and equipment, and to maintain, manage and control the same (Code of Virginia, 1950, Title 22, Chapter 6, Article 4, Section 22-97); to determine the studies to be pursued, the methods of teaching, and the government to be employed in the schools (Code of Virginia, 1950, Title 22, Chapter 6, Article 4, Section 22-97, Chapter 12, Article 2, Sections 22-233 to 22-240.1); to employ teachers (Code of Virginia, 1950, Chapter 6, Article 4, Section 22-97, Chapter 11, Section 22-203); to provide for the transportation of pupils (Code of Virginia, 1950, Title 22, Chapter 13, Articles 1 and 2, Sections 22-276 to 22-277, 22-279, 22-282 to 22-294); to enforce the school laws (Code of Virginia, 1950, Title 22, Chapter 6, Article 4, Section 22-97); and to perform the numerous other duties, activities and functions essential to the establishment, maintenance and operation of the schools of said City (Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1 to 22-10, Chapters 4 and 5, Sections 22-30 to 22-44, Chapter 6, Article 1, Sections 22-45 to 22-55, 22-57 to 22-58, Article 4, Sections 22-89 to 22-100, Chapters 7 to 15, Sections 22-101 to 22-166, 22-188.3 to 22-210, 22-212 to 22-246, 22-248 to 22-277, 22-279, 22-282 to 22-330).

9. Defendants, and each of them, and their agents and employees, maintain and operate separate public schools for Negro and white children, respectively, and deny infant plaintiffs and all other Negro children, because of their race or color, admission to and education in any public school operated for white children, and compel infant plaintiffs and all other Negro children, because of their race or color, to attend public schools set apart and operated exclusively for Negro children, pursuant to a policy, practice, custom and usage of segregating, on the basis of race or color, all children attending the public schools of said City.

10. Each infant plaintiff has made timely application to defendants for admission for the 1958-59 school session to a public school in the City of Newport News, Virginia, heretofore and now maintained for and attended by white persons only, but the defendants, acting pursuant to a policy, practice, custom and usage of segregating school children on the basis of race or color, have denied the application of each of said infant plaintiffs solely on account of their race or color.

11. The aforesaid action of defendants denies infant plaintiffs, and each of them, and others similarly situated, their liberty without due process of law and the equal protection of the laws secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and the rights secured by Title 42, United States Code, Section 1981.

12. On May 17, 1954, the Supreme Court of the United States declared the principle that state-imposed racial segregation in public education is violative of the Fourteenth Amendment of the Constitution of the United States. A formal demand has heretofore been made on behalf of plaintiffs and all other persons similarly situated that defendants conform to said decision and cease and desist from the policy, practice, custom and usage specified in paragraph 9 hereof. Notwithstanding, defendants, and each of them, refuse to act favorably upon this demand and purposefully, wilfully and deliberately continue to enforce and pursue said policy, practice, custom and usage against infant plaintiffs and all other Negro children.

13. Defendants will continue to pursue against plaintiffs, and all other Negro children similarly situated, the policy, practice, custom and usage specified in paragraph 9 hereof, and will continue to deny them admission, enrollment or education to and in any public school operated for children residing in said City who are not Negroes, unless restrained and enjoined by this Court from so doing.

14. Plaintiffs, and those similarly situated and affected, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the policy, practice, custom and usage and the actions of the defendants herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this complaint for an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as would deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury and occasion damage, vexation and inconvenience.

15. As a consequence of the purposeful, wilful and deliberate action of defendants, in continuing, in violation of their legal duty to plaintiffs, to segregate infant plaintiffs and other Negro children on the basis of their race or color, plaintiffs are required to employ attorneys and undergo great trouble, inconvenience and expense to litigate a vindication of their constitutional rights.

WHEREFORE, plaintiffs respectfully pray that, upon the filing of this complaint as may appear proper and convenient, this Court advance this action on the docket and order a speedy hearing of this action according to law, and, upon such hearing:

(a) This Court enter a preliminary injunction and/or a permanent injunction restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees, forthwith, from enforcing or pursuing against infant plaintiffs and other Negro children similarly situated the policy, practice, custom and usage specified in paragraph 9 hereof, and/or any other policy, practice, custom or usage of the same or similar purport, and/or any action whether or not pursuant to said policy, practice, custom or usage which precludes, on the basis of race or color, the admission, enrollment or education of infant plaintiffs or any other Negro child similarly situated to and in any public school operated by defendants at the same time, and under the same terms and conditions, and with the same treatment, that similarly situated children of any other race, color or group are admitted, enrolled, educated or given therein, upon the ground that any such policy, practice, custom, usage or action denies infant plaintiffs, and other Negro children similarly situated, their liberty without due process of law and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and the rights secured by Title 42, United States Code, Section 1981, and is for these reasons unconstitutional and void.

(b) That the defendants be required to submit for the approval of the Court, a complete plan for the desegregation of the public free schools of the City of Newport News, Virginia.

(c) This Court allow plaintiffs their costs herein, and reasonable attorneys' fees for their counsel, and grant such further, other, additional or alternative relief as may appear to the Court to be equitable and just in the premises.

s/W. Hale Thompson
Of Counsel for Plaintiffs

MOTION FOR INTERLOCUTORY INJUNCTION

Plaintiffs move the Court for an interlocutory injunction, pending the final determination of this cause, restraining and enjoining defendants, The School Board of the City of Newport News, Virginia, and R. O. Nelson, Division Superin-

tendent of Schools for the City of Newport News, Virginia, and each of them, their successors in office, and their agents and employees, forthwith, from denying infant plaintiffs, or either of them, solely on account of race or color, the right to be enrolled in, to attend, and to be educated in, the public schools of Newport News, Virginia, to which they respectively have sought admission, during the 1958-1959 school session.

EDUCATION
Public Schools—Virginia (Norfolk)

Leola Pearl BECKETT, et al. v. The SCHOOL BOARD OF THE CITY OF NORFOLK, Virginia, et al.

United States District Court, Eastern District, Virginia, Civ. No. 2214.

SUMMARY: In a suit filed in 1956, Negroes in Norfolk, Virginia, sought admission to schools previously classified as white. In early 1957, the federal district court held the Virginia Pupil Placement Act (Ch. 70, Va. Acts of 1956, 1 Race Rel. L. Rep. 1109) unconstitutional, and ordered the defendants to cease refusing, solely on account of race or color, to admit the plaintiffs to schools previously classified as white. (E.D. Va., 2 Race Rel. L. Rep. 46, 341). Although the effective date of this order was September, 1957, no further action was taken until June, 1958, when the district court, Hoffman, J., announced from the bench that all applications from Negro children for transfer must be acted upon with reasonable promptness, and without regard to race or color. Subsequently a number of legal developments occurred, which are set out chronologically below:

School Board Resolution of July 17, 1958

On July 17, the Norfolk School Board adopted a resolution stating the situation regarding integration, and announcing plans for a program of tests in connection with transfers of students.

RESOLUTION

WHEREAS, the School Board of the City of Norfolk, having fully considered the questions involved in the applications of Negro children for transfers to or initial enrollments in previously all white schools of the City of Norfolk, and having been advised by its attorneys of its duties and obligations under the order of the District Court of the United States, For the Eastern District of Virginia, entered in the cause of Leola Pearl Beckett, et al, v. The School Board of the City of Norfolk, et al, the 26th day of February, 1957, and being fully conscious of its responsibilities in the premises, recognizes that under the said order and in the light of the hearing before the Court held on June 7, 1958, that all applications received from Negro children, or their parents, seeking enrollment in schools of the City previously attended by only white children, must be acted upon with reasonable promptness and that all questions as to the rights of such children to be enrolled in any such school must be determined by the school authorities, without regard to race or color; and

WHEREAS, the School Board considers that it has the clear responsibility to treat all public school pupils fairly and justly in according to them the best educational facilities available and to avoid the assignment of any child to a grade level or curriculum not best adapted to the de-

gree of mental abilities and present scholastic achievements of such child; and

WHEREAS, the School Board recognizes its duty to operate all of the schools in the City School System with full regard for the public interest and for the proper interests of all pupils, regardless of race or color, and, therefore, must not unnecessarily burden any class or classroom or any entire school by the assignment thereto of more than a proper and workable proportion of the total number of students in the public schools of the City; and

WHEREAS, for the accomplishment of the purposes and ends described in the preceding preambles it is deemed both desirable and necessary that this Board adopt and apply assignment standards, criteria and procedures for their application,

NOW, THEREFORE, BE IT RESOLVED that the assignment standards, criteria and procedures hereinafter set forth be, and the same are hereby, adopted.

RESOLVED FURTHER that it being necessary to set a time limit for the making of applications for transfer from a previously all Negro school to or for initial enrollment in a previously all white school, or from a white school to a Negro school, no such application shall be considered or acted upon unless made to the proper school authorities prior to the 25th day of July, 1958.

STANDARDS AND CRITERIA

1. The assignment shall not endanger the health or safety of the child assigned to or the children already enrolled in the school.
2. The assignment shall not interfere with the proper administration of the school.
3. The assignment shall not interfere with proper instruction of pupils already enrolled in the school.
4. The assignment shall be made after consideration of the applicant's academic achievement and the academic achievement of the pupils already within the school to which he is applying.
5. The assignment shall be made with consideration for the residence of the applicant.
6. The assignment shall consider the physical and moral fitness of the applicant and their relation to the general health and welfare of the pupils already enrolled in the school.
7. The assignment shall consider the mental ability of the applicant seeking enrollment.
8. The assignment shall take into consideration the social adaptability of the applicant seeking enrollment.
9. The assignment shall take into consideration the expected emotional and social adjustment of the pupil to the school to which he is assigned.
10. The assignment shall take into consideration the cultural background of the applicant and the pupils already enrolled in the schools.

PROCEDURES

1. The Superintendent shall inaugurate and administer a program of tests to be given, as promptly as possible in the current year and between July 1st and August 20th of all subsequent years, to all children who apply, or for whom applications are made, for transfer from any other school, either within or without the City of Norfolk, to any public school of the City of Norfolk heretofore attended only by students of the opposite race, or who apply, or for whom applications are made, for initial enrollment in any public school of the City of Norfolk heretofore attended only by students of the opposite race, provided, however, that in the cases of the Negro children who have already applied for transfers or initial enrollments, or any others applying before July 25, 1958, such tests shall be given as soon as is reasonably practicable and not later than August 8, 1958, such tests to be applied and administered according to the standards and criteria above set out and on a racially non-discriminatory basis, the same to be a requisite before enrollment in all such cases.

2. The Superintendent shall appoint from the personnel of the City School System one or more committees of five members each, including himself as chairman, with the direction that each committee shall, before the 8th day of August of this year, and between July 1st and August 20th of all subsequent years, interview each student, and his or her parents or guardians, who applies or for whom application is made to be assigned to and enrolled in a school of the city heretofore attended only by students

of the opposite race, in order to determine whether such student meets the standards and criteria above set forth, and whether the requested assignment and enrollment are in accordance with the wishes of the particular student involved and of his or her parents or guardians; and thereafter promptly report its findings and recommendations, in writing, to this Board.

3. No pupil required to comply with the provisions of paragraphs 1 and 2 above shall be enrolled in any school except by the affirmative act of this Board, which shall in all cases exercise its proper discretion in making such assignments in the light of all the pertinent facts, but without regard to race or color.

ADOPTED: July 17, 1958

Injunction in State Court

Early in August, 1958, citizens of Norfolk asked for an injunction against the Norfolk city school board acting on requests for school placements and reassignments, contending that such duties under Virginia law could be performed only by the state Pupil Placement Board. On August 15, 1958, the Circuit Court of the City of Norfolk refused the injunction. However, three days later, at the instruction of Willis D. Miller, Justice of the Virginia Supreme Court of Appeals, such an injunction was issued. These two orders follow:

Coleman H. COLEY, et al. v. John J. BREWBAKER, Superintendent of Schools of the City of Norfolk, et al.

Circuit Court of the City of Norfolk, No.———, August 15, 1958.

ORDER OF REFUSAL

On Wednesday, August 13, 1958, came again the complainants, by counsel, and again moved the Court that it enter a decree for Temporary Injunction in the following form:

Upon the prayer of the within bill, an injunction is hereby granted the complainants, Coleman H. Coley and Muriel S. Coley, enjoining and restraining the Defendants, John J. Brewbaker, Superintendent of Schools of City of Norfolk, Paul T. Schweitzer, Chairman, William P. Ballard, Vice-Chairman, W. Farley Powers, Francis N. Crenshaw, Ben J. Willis, Sr., Mrs. Mildred J. Dallas, City School Board of the City of Norfolk, and each of them, their Successors in office, Agents, Representatives, Servants, and Employees from performing any act of enrollment of Placement of pupils in the Public Schools of the City of Norfolk, Virginia, and from the performance of any act in Determination of School attendance district for said City, until the further order of this Court. This injunction shall be effective from August ——, 1958, to ———1958, at which time it shall stand dissolved unless prior thereto it be enlarged or further injunction granted.

The dates to be supplied by the Court or as agreed by the parties; came also the defendants, by counsel, in opposition to said motion and pursuant to the show cause order issued against them on August 7, 1958; and such motion was argued by counsel.

Upon consideration whereof, the Court doth overrule said motion and doth decline to enter said decree for Temporary Injunction.

To the action of the Court in overruling the motion and refusing to enter said decree the complainants duly excepted.

* * *

Coleman H. COLEY, et al. v. John J. BREWBAKER, Superintendent of Schools of the City of Norfolk, et al.

Circuit Court of the City of Norfolk, No.———, August 18, 1958.

This day came the complainants by counsel and after notice to respondents presented their Bill for an injunction duly verified by affidavit, and with exhibit attached, together with the

original order of the Circuit Court of the City of Norfolk dated August 15th, 1958, denying an injunction as prayed.

Upon consideration whereof an injunction is hereby awarded said complainant, Coleman H. Coley and Muriel S. Coley, in accordance with the prayer of the said Bill enjoining and restraining the said respondents, John J. Brewbaker, Superintendent of Schools of the City of Norfolk, Paul T. Schweitzer, Chairman, William P. Ballard, Vice-Chairman, W. Farley Powers, Francis N. Crenshaw, Ben J. Willis, Sr., Mrs. Mildred J. Dallas, City School Board of the City of Norfolk, and each of them, their successors in office, agents, representatives, servants and employees, from performing any act of enrollment or placement of pupils in the public schools of the City of Norfolk, Virginia, and it is so adjudged and decreed.

This injunction shall be effective from this date, August 18th, 1958, until the 15th day of October, 1958, at which time it shall stand dissolved unless sooner enlarged, modified, or dissolved. For good cause shown no bond is required of the complainants, but this shall not be construed to prevent the Circuit Court of the City of Norfolk, from requiring of complainants or someone for them a reasonable bond if deemed requisite.

It is further ordered that a copy of this order be served upon each of the respondents.

To the Clerk of the Circuit Court of the City of Norfolk, Virginia: Enter this decree August 18th, 1958.

Willis D. Miller
Justice of the Supreme Court
of Appeals of Virginia

School Board Resolution of August 18, 1958

On August 18, the school board announced in a resolution that it had considered 151 applications for transfers under the criteria and procedures outlined on July 17. All 151 were rejected.

RESOLUTION

Stripped of the racial overtones, the basic problem here is whether certain pupils should be transferred from one school to another or initially enrolled in a specific school. The reason set forth in their requests is primarily that it is more convenient for the students to attend the selected school than to attend another school to which, otherwise, they would be assigned.

Although the School Board is aware that the petitioners are all of one race asking to be assigned, for the first time in the history of the Norfolk City School System, to schools of the opposite race, it has attempted to approach the problem from the standpoint of sound education.

Accordingly, the first premise in considering any of these applications is that only those pupils who are sufficiently mature or advanced scholastically should be considered. Upon this assumption, the School Board on July 17, 1958, adopted a resolution setting forth certain criteria to be applied toward all applications for transfer or enrollment. At the same time, procedures were set up for testing the applicants and otherwise processing the petitioners. After careful examination and extensive interviews, the information relative to all of the applicants has been collected by the administrative staff and reviewed by the School Board.

There were 151 children who applied for transfer or initial enrollment. One withdrew his application, 61 declined to take the tests prescribed by the School Board, and one declined to complete the testing procedure by refusing the interview. Accordingly, the Board hereby declines these 63 applicants.

Of the remaining eighty-eight, sixty were clearly unsuitable for the assignment requested. The vast majority failed to meet the minimum scholastic requirements. The others were denied for equally cogent reasons. As for the remaining twenty-eight, the Board feels that these applications fall into two categories:

(a) Of four of these pupils, one has sought assignment to Maury, one to Granby, and two to Blair. Considering these applications against its understanding of the United States Supreme Court's decision in Brown versus the Board of Education, the School Board believes that the individual applicants would receive no educational benefits from the requested assignment,

but would only suffer thereby. It is believed that the isolation which would be caused by such an assignment would be detrimental to educational progress and may well cause emotional instability and even detriment to health.

(b) Of the remaining twenty-four children, nine requested entry to Norview Elementary School, six to Norview Junior High School and the remaining nine to Norview High School. As to these children, the Board feels it must deny their applications because it is not in the best interest of the applicants nor of the present students to grant such petitions. Racial conflicts have occurred in this area in the past and the Board is of the opinion that integration there would renew such conflicts and produce grave administrative problems within the school system—all to the detriment of good education and the public welfare.

Nine of the Norview children, who have met the minimum scholastic requirements, are applying for entrance to Norview Elementary School. They reside in the Rosemont-Coronada area in which the City of Norfolk is now making plans to build an elementary-junior high school which will be ready for occupancy in September, 1959. In addition to the reasons set out above, the School Board believes that the transfer of these nine children would at most be for the period of one year, or until the Rosemont School is opened, and the dislocation occasioned to the children by the multiple transfers is not good for the children. It must be further borne in mind that the school to which they seek entrance, Norview Elementary, is so crowded that it will be on part time during the school year 1958-59.

Accordingly, the 151 petitions are denied.

* * *

District Judge's Statement of August 25, 1958

On August 25, District Judge Walter E. Hoffman met with the Norfolk School Board and presented a statement outlining the case and setting forth his interpretation of the proper constitutional criteria for school assignment in light of the Supreme Court segregation decisions.

MEMBERS OF THE SCHOOL BOARD
OF THE CITY OF NORFOLK:

I have asked that you meet with me today in an effort to clarify certain matters which relate to the proceedings now before this Court. My remarks, while directed primarily to you as the governing body of the school system, apply equally as well to the Superintendent, Assistant Superintendents, clerical assistants and anyone connected with admitting, enrolling, or educating children in the public school system of the City of Norfolk. The reason for this is that the injunction order of this Court entered on February 26, 1957, is effective, not only as to you and your able Superintendent, Mr. Brewbaker, but also as to your successors in office, agents, representatives, servants and employees. My comments, other than when referring to language used by the various courts, will not contain any legal terms incapable of being readily understood.

HISTORY OF LITIGATION

At the risk of being repetitious, a resume of the history of this protracted litigation appears to be in order. As you already know, on May 17, 1954, the United States Supreme Court rendered a decision in Brown v. The Board of Education of Topeka, and other related cases, which in effect held that compulsory segregation in public schools was unconstitutional as being in violation of the Fourteenth Amendment providing for equal protection of laws. In so doing, the highest court of this land reversed at least one of its prior decisions holding, by inference, that compulsory segregation in public schools was constitutional as long as separate but equal facilities were provided to the members of various races.

With this decision many of us are in disagreement. It is said that the decision of the Supreme Court is, in itself, an unconstitutional act in violation of the Tenth Amendment to the Con-

stitution which provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. As an initial proposition this contention appears to be meritorious, but this question has been concluded adversely to the proponents thereof.

On March 7, 1819, a great Virginian, Chief Justice John Marshall, delivered an opinion in the case of McCulloch v. Maryland which, so far as it may be pertinent to the critical problem now facing the people of our Southern states, holds that the Supreme Court of the United States is the final authority created for the purpose of construing and interpreting the Constitution of the United States. Indeed, Article III of this immortal document provides that the judicial power of the United States shall be vested in one Supreme Court and in such *inferior* courts as the Congress may from time to time ordain and establish. Manifestly it cannot be questioned that the interpretation and construction of the Constitution by the United States Supreme Court is final and binding. Only a constitutional amendment may change this settled principle of law.

[*Not To Question Wisdom*]

We are not here today to question the wisdom of the action by the highest court of our nation. The right peaceably to disagree is inherent in our right of free speech and freedom of the press. Nevertheless, it is a required responsibility of good citizenship that every person in the community respect the law and its processes. The observance of law is fundamental to our existence as a nation of free people under constitutional government.

Subsequent to its momentous decision of May 17, 1954, the Supreme Court heard arguments on the complex problem respecting formulation of decrees to carry into effect the decision in the Brown and other related cases, including the case arising in Prince Edward County, Virginia. On May 31, 1955, more than one year following its original decision, the Supreme Court referred these matters to the district courts for further proceedings. In so doing the Court recognized that implementation of the constitutional principles required solution of varied school problems. It imposed upon the school authorities the primary responsibility of elucidating, assessing, and solving these problems. It stated that the district courts would be required to consider whether the action of school authorities constituted "*good faith implementation*" of the governing constitutional principles. It noted that, by reason of their proximity to local conditions and the possible need for further hearings, the district courts could best perform this *judicial* appraisal. It told the courts to be guided by equitable principles characterized by a practical flexibility in shaping remedies, as well as balancing, adjusting and reconciling public and private needs. As district courts we were instructed that children were entitled to admission in public schools, on a nondiscriminatory basis, as soon as practicable. The Supreme Court went further, however, by saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with such principles. It observed that a prompt and reasonable start must be made toward full compliance with the Court's earlier decision, and suggested that, once such a start had been made, the district court may find that additional time would be necessary to carry out the ruling in an effective manner. The burden was placed upon the school authorities to establish the necessity of additional time in the public interest and consistent with "good faith compliance" at the earliest practicable date. It suggested that plans could be submitted by the school authorities to the district courts in order to effectuate a transition from a segregated to a nondiscriminatory school system.

[*Action Begun in 1956*]

In this setting the present Negro plaintiffs and their parents or guardians instituted this action on May 10, 1956. When the matter was first brought to the attention of this Court on July 2, 1956, the Court had knowledge of the fact that the Chief Executive of the State of Virginia had declared his intention to call an Extra Session of the General Assembly of Virginia in September, 1956. For this reason, action was deferred awaiting the results of such legislation as might be enacted. Certain laws were created including, among others, a Pupil Placement Act. A question as to the constitutionality of this Act was raised by the plaintiffs in this action and the Court ordered pre-trial briefs, heard argument for five hours on November 17, 1956, received and considered post-trial

briefs, and subsequently handed down an opinion on January 11, 1957, holding the Pupil Placement Act unconstitutional on its face. Thereafter, on February 12, 1957, the Court heard the evidence and argument of counsel relating to the merits of the case and, on February 26, 1957, entered the injunction in question. You will note from the wording of the injunctive order that you are not required to integrate the public school system—you are merely prohibited from refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under your operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to, and enrollment and education in, such school. The Court retained jurisdiction of the case for future action as may be necessary, including the power to enlarge, reduce or otherwise modify the decree. The injunction was made effective as of August 15, 1957, to be operative for the school term 1957-58. In its written opinion, and in line with the Supreme Court decision, the Court suggested that it would consider any plan promulgated by you with respect to gradual desegregation if submitted prior to August 15, 1957; the Court having expressed the view, now substantiated by your experienced educators, that gradual desegregation would be preferable.

[*No Plan Submitted*]

No plan was submitted within the time stated and none has as yet been formulated. You elected to appeal from the Court's decision, including the ruling as to the unconstitutionality of the Pupil Placement Act, all of which was clearly within your rights, and, on July 13, 1957, the United States Court of Appeals for the Fourth Circuit affirmed the decree of the district court. Proceedings were then held in abeyance pending action on a request by you for a review by the United States Supreme Court. On October 21, 1957, the latter Court declined to review the case and the decree of the district court entered on February 26, 1957, thereupon automatically became operative.

Presumably because this Court had noted that it would be unwise to permit desegregation during the existence of any normal school year, the plaintiffs took no further action until May 12, 1958, when they filed a motion requesting the Court to fix another effective date for the injunction. At a hearing on June 7, 1958, counsel for all parties, including the Attorney General of Virginia, agreed that the injunctive decree of February 26, 1957, was then in full force and effect; that it was valid and binding; and that it precluded other defenses excepting those which could be interposed to individual applications. As school children are not admitted to public schools as a group, but must be considered individually, the Negro children seeking transfers to another school were directed to file applications with you. It is my understanding that 151 applications were filed, all of which were denied by your action of August 18, 1958.

[*Resolution of July 17*]

On July 17, 1958, you adopted a resolution setting forth certain standards and criteria governing your consideration of the applications, as well as a procedure to be followed by the applicants relating to the taking of tests. While certain plaintiffs and attempted intervenors now attack the constitutionality of this resolution, together with the standards, criteria and procedure, it is not essential that I discuss this phase of the case at this time. For the purpose of further deliberations, you may assume that those children who failed to take the tests, or submit to personal interviews, may, in your discretion, be declined admission to the school requested by them. This is not to say that you cannot, in your judgment, admit one or more of these applicants, and I do not suggest to you that you should, or should not, admit any particular applicant. As the Supreme Court has indicated, this is your primary responsibility and, while I do not doubt the authority of this Court to admit a child under certain circumstances, to commence such a practice would establish a precedent which may result in school boards, particularly in the South, denying all applications, thus requiring district courts to act.

You have undoubtedly observed from the foregoing history of the case that you, as members of the School Board, and I, as District Judge, have an equal responsibility to fulfil. To say that it is a difficult one is indeed an understatement. You and Superintendent Brewbaker, as well as others in the educational family, have a thankless task. If you faithfully perform the duties of your office, you will only be recompensed by the knowledge that you, as public officers serving without hope of financial reward, have recognized your duty to support the Con-

stitution of the United States, and to respect the laws and courts of your Government, irrespective of your personal convictions relating to the wisdom of admitting Negro children into previously all-white schools and vice versa.

GOOD FAITH VERSUS GOOD FAITH COMPLIANCE

It is because I am firmly convinced that you have heretofore acted in good faith from an educational viewpoint that I am now referring back to you for further consideration all of the applications filed by the children involved. With the exception of one of your members, no attorney is serving on the School Board. Regrettably the attorney member is now confined to the hospital and will be unable to assist you in further deliberations prior to the commencement of the school term. If the Court was not convinced that you had acted in what you sincerely believed was in good faith up until this date, the Court would be obliged to take other appropriate action.

Apparently, however, the Supreme Court did not intend that the "good faith" to be exercised by school authorities should be confined solely to what you honestly and sincerely may believe is for the best interest of the child, the children in the affected school, and the public in general. Inexplicable though this may be, it is significant that your duties require a balancing of the public and private needs. In this connection, while there is a sharp conflict of opinion on the subject, the Supreme Court has accepted the theory that "segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system". In your capacity as members of the School Board, you are representatives of all citizens of this city, without regard to race or color. The private interests of the Negro child should properly be considered by you in adjusting the public and private needs. You have not sought the advice or suggestions of Negro educators in your school system for the reason that the situation may prove "embarrassing", although your Superintendent indicated that your Negro educators were as fully qualified (and in many instances more qualified) than your educators who are of the white race. Embarrassing though it may be to either you, the Negro educators, or both, you have a grave problem to consider. It is not, however, my function to dictate to you what administrative steps you should take in familiarizing yourselves with the details of this problem in adjusting the public and private needs. Such action is essentially within your province.

[*Meaning of "Good Faith"*]

You will observe that the Supreme Court, in applying the term "good faith", has not confined these words to what we, in every day language, construe it to be. A critical analysis of the second Brown opinion will reveal that the words "good faith" appear therein on two occasions. The first time it is said that courts will have to consider whether the action of the school authorities constitutes "good faith *implementation of the governing constitutional principles*". Next, it is said that once a prompt and reasonable start toward full compliance with the prior Brown ruling has been made, the courts may determine that additional time is necessary to carry out the ruling, but the burden rests upon the school authorities to prove the necessity of additional time in the public interest, and the proof must be consistent "with good faith *compliance at the earliest practicable date*". At no time has the Supreme Court used the words "good faith" as we would ordinarily interpret the same, and, you will observe, the granting of additional time presupposes that a prompt and reasonable start toward full compliance has been made.

The question of "good faith" has been the subject of varying interpretations by able and experienced jurists whose opinions I hold in greatest respect. However, it should be noted that the appellate courts have leaned to the view expressed herein and, as you well know, in the faithful performance of my duties as required by the oath of my office, I am bound to give greater weight to the decisions of these higher courts, irrespective of my personal views as to the correctness of these rulings.

As jurists have obviously disagreed with respect to the proper construction of the Brown case, as well as other decisions of the courts, it can hardly be expected that you, unfamiliar as you must be with the legal principles, should be subjected to further appropriate action by any court until you have had sufficient opportunity to weigh the questions presented in light

of the law as interpreted by this Court. While counsel for all parties have concurred that it is appropriate for me to make remarks to you at this time, neither side has agreed that my legal conclusions are correct—in fact, counsel have not been given advance information as to the contents of this statement. Dependent upon what action you finally take, either side may appeal from my remarks and thereafter other courts, far more experienced and qualified to act, will then review my conclusions.

CLOSING OF SCHOOLS

I am not unmindful of the fact that you must have considered these applications with full knowledge that any previously all-white school to which a Negro child may be enrolled is automatically closed under the laws of the State of Virginia. The wisdom or legality of such laws is not before this Court for determination in this proceeding. It is sufficient to state that the United States Court of Appeals for the Fourth Circuit (which includes the State of Virginia) recently said in a case arising in Virginia:

> "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights."

By reason of the foregoing legal pronouncement, you are told that, in considering the applications for transfer or admission, you should disregard the fact that a particular school may be closed by operation of Virginia law, and this is true even though there may be only one child qualified to enter such school.

UNUSUAL PROCEDURE ADOPTED BY THIS COURT

I know of no precedent for the procedure adopted by this Court in referring the applications back to you for further consideration, but we have embarked upon a field of new and strange interpretation of the law and, in the interest of equity and fairness to you, it is my considered opinion that you should be granted this privilege by the one who may ultimately be required to determine whether or not you have complied with the decree of this Court, specifically approved by one appellate court, and tacitly approved by the highest court of the land. Because I believe that the good faith exercised by you to date has been in the light of what you have considered as sound educational principles only, and without proper regard to the law of the land as construed by the United States Supreme Court, it is only simple justice that you should receive my views on your reasons for declining the 151 applications of the Negro children. I shall not require you to admit any specific child. The consequences of your further action should rest with your own conscience consistent with your duty to adhere to the principles of law which I have stated and will state. I do not mean to infer that I shall shirk my duty if, after considering this lengthy statement, you continue to rest upon your prior action. On the other hand, if you admit one or more Negro children into previously all-white schools, it is my sincere hope that you will do so by stating that the admission is granted "pursuant to law". You may consider it compulsion, direct or otherwise, but it is not compulsion by the judge of this court as an individual; it is merely adherence to the law of the land.

While I am referring all applications back to you, you are not required to take action granting or denying admission in all cases. An order has been entered fixing Wednesday, August 27, 1958, at 10 A.M., as the last date for the allegedly aggrieved children to file appropriate objections to your prior action in denying the applications. It is possible that some of the children, and their parents or guardians, may be willing to abide by your former action, but as I am unable to anticipate how many additional objections will be filed prior to the deadline fixed by the Court, it is suggested that you now review all applications in order that you will be enabled to act promptly when any objection is interposed to your previous action. You may, of course, grant any application in your discretion even though no objection has been filed. The Court will assume that, with respect to such applications as may not be granted after reconsideration by you, you are adhering to your prior action taken on August 18, 1958.

GEOGRAPHICAL LIMITATIONS

You are not required to admit, although you may do so in your discretion, any otherwise

qualified Negro child to a previously all-white school who resides in a home nearer to the previously all-Negro school attended by said child during the prior school year, conditioned, however, on certain statements hereinafter made. In determining which school is closer, you may consider transportation facilities available or contemplated in the immediate future, as well as the automobile mileage from the home to the several schools in question, together with the dangers attendant upon young children required to cross heavily traveled highways not customarily attended by traffic police. You may, however, determine that even though a Negro child resides in closer proximity to the school attended solely or predominantly by Negroes, the transportation facilities available or contemplated in the immediate future are such that it would be manifestly unfair to the otherwise qualified Negro child to require him to attend what I have referred to as the Negro school.

RACIAL TENSION

Considerable evidence has been introduced to the effect that, if otherwise qualified Negro children are admitted to Norview High School, Norview Junior High School, or Norview Elementary School, the racial tension existing in these areas is such that an appropriate assignment would endanger the safety of the pupil, as well as those already enrolled in the school. It would, according to your statement, interfere with the proper administration of the school and the proper instruction of the white children already enrolled there. You state that such racial tension would create many problems in making a social and emotional adjustment, and that the differences in the cultural backgrounds are such that the applicant would be handicapped. It was for the best interest of these applicants, the school, and the public, that you denied certain requests from otherwise qualified Negro children.

The foregoing syllogism affords another cogent reason why the applications should be sent back to you for further consideration. You denied these 151 applications of Negro children on the same day that the case of Aaron v. Cooper was decided by the United States Court of Appeals for the Eighth Circuit, but you did not have knowledge of the action of that court at the time you made your determination on the merits of each application. The case referred to concerned the correctness of the celebrated decision rendered by District Judge Harry J. Lemley from the Eastern District of Arkansas. Judge Lemley's decision was reversed by a 6 to 1 opinion, with Chief Judge Gardner dissenting. Pending action by the appellate court aforesaid, it is only reasonable to state that you, as educators and businessmen, had the right to assume that the lower court's conclusions were correct. This Court observes that your reasoning applied in denying otherwise qualified Negro children admittance to the Norview schools is substantially in line with Judge Lemley's opinion. The Court of Appeals disagreed with these views and held, in substance, that evidence of racial tension or racial violence is legally insufficient to postpone compliance with a court decree entered in line with the Brown decision.

[*Arguments Heard*]

On last Friday night, this Court heard arguments of counsel, including those of the Attorney General and the Assistant Attorney General of Virginia, for three hours on this and other related questions. The Court is grateful to counsel for their views expressed and, as an added word, it is a feeling of extreme satisfaction that, after a week long trial, it may be said without fear of contradiction that there has been a total absence of racial tension in the courtroom. Likewise, the evidence adduced last week does not affirmatively suggest that there will be acts of racial violence, as contrasted with racial tension in the schools, which would disrupt the operation of the schools if they are permitted to open. Indeed, the Superintendent indicated that he was aware of the fact that local authorities had prepared themselves to combat any acts of violence.

Assuming, however, that conditions of racial tension or racial violence may exist, the decision in Aaron v. Cooper, as set forth by the Court of Appeals, precludes further consideration of a plea of probable racial tension or racial violence as a sole legal excuse for denying an otherwise qualified Negro child admittance into a previously all-white school. At the time these remarks are being made, a stay has been granted as to the Eighth Circuit's ruling. Whether the stay will be vacated by one or more of the Justices of the United States Supreme Court is of no consequence as far as our case is concerned. The law is as expounded by the Eighth

Circuit until and unless reversed by the United States Supreme Court, and this interpretation of the law is controlling in the present proceeding in the absence of a conflicting ruling from the United States Court of Appeals for the Fourth Circuit, which latter court has already held, as previously noted, that a person may not be denied enforcement of constitutional rights because of action taken or threatened in defiance of such rights.

For the reasons aforesaid, and without commenting upon the correctness of the decisions referred to, you are told that evidence, suggestions, or opinions as to probable racial tension or racial violence should not be considered by you in determining whether or not an otherwise qualified Negro child is entitled to be admitted into a heretofore all-white school. Likewise, such related problems as may naturally and probably flow from factors of racial tension or racial violence may not, standing alone, provide a basis for denial as heretofore stated. This is not to say, however, that if racial tension or racial violence occurs subsequent to the admission of the Negro child, and the fault lies primarily with the child by reason of his or her activities, excluding consideration of race, the child could not be appropriately dealt with by suspension, expulsion or transfer as an administrative matter.

THE ISOLATED CHILD

As to another group of applicants, you have denied admission to otherwise qualified Negro children solely under the theory that the Negro child would be "isolated", and that educators despair of teaching pupils who are anxious, insecure children, and who may feel unwanted by their group. Psychologists are in agreement that the factor of being isolated is one, but only one, situation which may tend to deter the child. It is similarily the feeling of psychologists that a child so isolated is motivated to progress in his classroom work and train his emotional stability to combat the isolated feeling. These are the views as reflected by the evidence and need not be considered as my personal views. It is perfectly apparent, from a legal standpoint, that the sole reason advanced by you in denying such an application of an otherwise fully qualified Negro child is legally insufficient.

SCHOLASTIC ACHIEVEMENT, TESTS AND INTERVIEWS

Pursuant to your resolution adopted on July 17, 1958, you required each applicant to submit to the California Achievement Test, as well as to interviews with your qualified educators and psychologists. In this period of transition from a segregated to a racially nondiscriminatory school system, it is the Court's view that, where fairly administered, the factors of prior scholastic achievement, reasonable tests, and results of personal interviews may, in your sound judgment, be considered in determining the propriety of admission of a Negro child to a previously all-white, as well as to a predominantly white, school, and vice versa. Contrary to the argument of some of the applicants, this Court finds no support in the contention that a child determined to be qualified for admission to, for example, the fourth grade, and who is then about to enter the fifth grade in the school now attended by him, has a constitutional right to demand entrance into a lower grade in a previously all-white school. As pointed out in argument, this would result in the geographical limitation becoming the only effective and legal reason for the denial of any application. The School Board has heretofore required tests and interviews in special cases involving transfers and admissions; you are now continuing that practice which is not an unreasonable educational function. There is nothing in the Brown decision which states that geographical location shall be the sole controlling factor in ascertaining the right of admission of any child.

You are to be commended in the fairness with which you administered these tests and interviewed these applicants under rather trying circumstances. Your integrity is exemplified by the total absence, as of this date, of any charge indicating prejudice in the giving or correcting of such tests. Even the experienced educator submitted by the plaintiffs concedes that, in this transition period, tests and interviews are in order. While this witness expressed the view that the standard applied was, in his opinion, a bit severe, he readily agreed that such was a matter of judgment over which this Court is not concerned unless it be plainly discriminatory.

In reviewing these applications, however, it may be well to consider especially the achieve-

ments, or lack of same, of those children in the first and second grades where, according to your own educators, it is suggested that desegregation should begin on a gradual basis, and where, according to all witnesses, it appears that the tests are not of as great importance in determining the ability of the child to adjust to the situation and keep abreast of the other children in his work. You may similarly consider, where the denial may have been grounded upon a minor deficiency showing in the achievement test, the circumstances under which the child took the test to determine whether the child is academically qualified.

One of your members testified that, in his opinion, a child did not appear to meet the academic qualifications prescribed; a view that was not shared by your Superintendent. In determining the qualifications of any child, it is only proper that the conclusion should be reached by your joint action, and not that of any individual member, although the views of that member may be carefully weighed in arriving at your final conclusion.

TOO FREQUENT TRANSFERS

The evidence discloses that, as of September 1, 1959, a new school for elementary children will be constructed and available for occupancy by children in the Rosemont area. At the present time Negro children in that locality attend Oakwood Elementary School, heretofore used only by Negro children. Several applications have been presented involving children who live in the immediate neighborhood of Norview Elementary School, heretofore attended solely by white pupils. No question has been raised as to the construction and availability of the new Rosemont School on September 1, 1959, which, by reason of its general location approximately seven blocks from the existing Norview Elementary School, will presumably be occupied predominantly by Negro children. The question presented is whether, if a Negro child will be transferred to Rosemont next year, should the child otherwise fully qualified be admitted this school year to Norview Elementary, a school many blocks closer than Oakwood Elementary heretofore attended by said child.

Among all the varied problems presented to the Court in this proceeding, this is the most complex from a legal standpoint. Undoubtedly such a child, otherwise fully qualified, has a constitutional right to attend Norview Elementary. May that right be deferred for one year where the testimony establishes that the child will again be transferred to Rosemont the following year? Subject to the following comments, the Court holds that, in the exercise of sound discretion and where proof convincingly establishes that the second transfer must hereafter be made to Rosemont, the constitutional right may be deferred for the one year period. The establishment of a new school will require a new geographical unit area which may, or may not, bring about the later transfer of the child seeking admission to Norview Elementary. This is the type situation which was referred to by the Supreme Court when it said in Brown:

> "Once such a [prompt and reasonable] start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner."

Psychologists and educators have testified that too frequent transfers have an adverse effect upon a child, and upon this ground you have predicated your denial of certain applicants otherwise qualified. In reviewing these applications you should first determine with certainty that the child involved will definitely be transferred to Rosemont next year. If this subsequent transfer is not, in your opinion, certain, the child is entitled to his constitutional rights at this time irrespective of the effect of the school-closing law. A transfer from Norview Elementary to Rosemont next year, based solely on race or color, would not be lawful. You may consider the new unit area applicable to the Rosemont School and, if you need additional time to determine same, you may defer final action on this group of applications until September 5, 1958, but report in the meantime as to the other groups as you have all of the information available. You need not defer if you are sufficiently able to view the applications in light of my remarks. Even though you may conclude that a child will be transferred to Rosemont next year, you may, in your discretion after considering the proximity of the child's home to Norview Elementary and the distance and inconvenience of travel to Oakwood Elementary, grant admission to Norview. In this latter situation you would be weighing the advantage of proximity to the school (and perhaps other factors) against the deterrent effect of a

too frequent transfer. Some mention has been made to the effect that Norview Elementary may be on a part-time basis for the first and second grades. The evidence likewise demonstrates that Oakwood Elementary will definitely be on a part-time basis for the same grades, and perhaps others. Where the ability to accommodate the child is equal, and the child is otherwise fully qualified, the transfer may properly be considered by you. These are matters with which you are primarily concerned in "elucidating, assessing, and solving the problem" presented as to each individual applicant.

REQUEST FOR DELAY AND DISADVANTAGES OF DESEGREGATION IN HIGHER GRADES

We arrive, finally, at the contention that the problem of adjustment in the higher grades is considerably greater than that of adjustment in the lower grades under adverse conditions presented by the anti-discrimination rule as announced by the Supreme Court. With this contention this Court is in complete agreement. It is now urged by your counsel that you, as members of the School Board, may properly defer action until such time as you have a reasonable number of otherwise qualified Negro children seeking admission into the lower elementary grades. Being fully aware of existing conditions, I must regrettably advise that you must act in accordance with the decree of this Court entered on February 26, 1957, which decree has been affirmed. The constitutional rights of the older children could never legally be subordinated to such a suggestion of deferment where there is a total absence of the prompt and reasonable start required by the Supreme Court. Moreover, even assuming that this Court now had the legal power to grant such a deferment (a proposition that is exceedingly doubtful at this stage of the proceedings), there would be no legal justification for same where the burden rests upon the school authorities to establish that the additional time is necessary in the public interest *and* that such additional time is consistent with good faith compliance at the earliest practicable date. This Court has endeavored in vain to ascertain from witnesses and counsel, including the able Attorney General, when the good faith compliance would be forthcoming. None have answered this pertinent inquiry. Indeed, none are able to respond to the same. Under the circumstances the request for any further deferment, already delayed one year by reason of appeals, could not legally be granted by this Court under the law. Much has been spoken and written as to the subject matter—a bit of activity directed to a prompt and reasonable start would appear to be in order.

THE STATE COURT INJUNCTION

A certified copy of an injunction order directed to you and issued by the Circuit Court of the City of Norfolk, Virginia, at the instance of two of the Justices of the Supreme Court of Appeals of Virginia, has been introduced in evidence and filed in these proceedings. As you have not yet indicated that you intend to assign or enroll any Negro child into a previously all-white school, I deem it inappropriate to consider the effect of the state court injunction at this time. If, as and when you definitely decide that any Negro child is entitled to be admitted or enrolled in a previously all-white school and that you intend to so admit or enroll such child, you should then immediately advise this Court, at which time further proceedings may be held.

INVITATION FOR FUTURE CONFERENCE

This Court has repeatedly said that it is willing to confer with the School Board to discuss the legality of any question involved by reason of the Supreme Court's ruling in Brown, but such a conference would, of necessity, have to be in the presence of counsel for all parties and considered as a part of these proceedings. A suggestion by one of your members several months past indicated that you would want such a meeting, but apparently this thought was discarded when I mentioned that counsel for all parties must be afforded the opportunity to be present. The problems arising from the Supreme Court's ruling will continue for many years and I repeat my willingness to enter into any conferences with you under the conditions as stated above. The burdens weigh heavily upon all of our shoulders and hearts, and we share it together.

With complete faith in the integrity and ability of the School Board of the City of Norfolk, as well as your desire to obey the law of the land and do justice to all mankind, the applica-

tions of the 151 Negro children are referred back to you for such further consideration, if any, as you may deem proper and legal by reason of my remarks. Other than as noted herein, you will report the results of your actions, if any, on Friday, August 29, 1958, at 10 A.M.

WALTER E. HOFFMAN

• • •

School Board's Report of August 29, 1958

Subsequently, the school board filed a report in response to the judge's statement announcing that 17 Negro students would be assigned to white schools.

To the Honorable Walter E. Hoffman, Judge of the United States District Court for the Eastern District of Virginia:

On August 25, 1958, the Court, in its Remarks delivered during the course of the hearing in this cause, referred back to The School Board of the City of Norfolk, for such further consideration and action, if any, as the Board might deem proper and legal in the light of the applicable law as interpreted by this Court, all of the 151 applications of Negro children for transfers to or initial enrollments in certain grades in certain public schools of the City of Norfolk previously attended only by children of the White race, which applications had been rejected by the Board on grounds shown by the evidence in this cause. The Court, also on August 25, 1958, directed the School Board to report the results of its actions, if any, after such further consideration, to this Court on August 29, 1958, at 10 A.M.

In compliance with said reference and direction, but without waiving any of the said grounds assigned for the aforesaid rejections or any of the exceptions heretofore or hereafter taken by the defendants on legal grounds to the said Remarks of the Court or to the interpretation therein of the applicable law by the Court, the School Board has reconsidered said applications and now submits its report as follows:

1. Contrary to what all of the members of the School Board and the Division Superintendent of Schools honestly and sincerely believe is in the best interests of the applying children, the children in the affected schools and the public in general, but pursuant to the law as interpreted by the Court and the duties required of the defendants under the injunctive order dated February 26, 1957, as the School Board understands the Court's interpretation and application of the same, the following children who objected to the action of the School Board on August 18, 1958, denying their applications, will be assigned to and enrolled in the grades and schools set opposite their names for the school year 1958-'59:

Name of Applicant	*Grade*	*School*
Patricia Godbolt	11	Norview High
Geraldine V. Tally	7H	Northside Jr.
Patricia A. Turner	8	Norview Jr.
James A. Turner, Jr.	7	Norview Jr.
Claudia Wellington	7	Norview Jr.
Carol J. Wellington	10	Norview High
LaVera Erlone Forbes	7	Norview Jr.
Betty Jean Reid	10	Granby High
Johnnie Anita Rouse	10	Norview High
Reginald Young	9	Blair Jr.
Lolita Portis	7	Blair Jr.
Alveraze F. Gonsulande	11	Norview High
Edward F. Jordan	7	Norview Jr.
Delores Johnson	11	Norview High
Olivia Driver	9	Norview High
Andrew I. Heidelberg	9	Norview High
Lewis Cousins	10	Maury High

2. The applications of the children who failed to take the tests or to submit to the personal interviews are denied. This action is taken in accordance with the School Board's understanding of the Court's Remarks contained in the last complete paragraph on page 5 of the mimeographed copy thereof. These children are:

Barbara Elizabeth Bond, Evelyn Welch, James Lloyd Scott, Jr., Valerie Thea Edmonds, Doris Mae Hines, Rosa Lee Holmes, Daphne Perminter, John Curtis Robinson, Gladys Tatem, Geraldine White, Shirley Ann Brown, Ruverta Holmes, Ernest Holmes, Maybell Pick Johnson, Vance C.

Taylor, Jr., Gloria E. Tyler, Esther Elaine Vester, Helen L. James, Earl Powell, Barbara Jane Stanley, James L. Taylor, Jr., Walter Eugene Tolton.

Theresa Gaines, Helena Johnson, John Duley, Jr., Walter Taylor, Quincy Scott, Jr., Marilyn M. Henderson, Queenie E. Brown, Vincent D. Foster, David Brown, William B. Spencer, Margot D. Jordan, Juanita Welch, Rosa Mae Boone, Chrystal Griffin, Mable Holmes, LeRoy Lee, Jr., Laurene Pryor, Rosa Lee Tatem, James Alfred Tatem, Mary Louise Brown, James Holmes, Jr.

Bernard Holmes, Gwendolyn Holmes, Audrey Taylor, Melvin D. Tyler, Shelia Rosetta Vester, Carol J. Freeman, Viola Jackson, Thomas Stokes, Grover Stanley, Evelyn Taylor, Linette Delores Tolton, Mary Holmes, Arthur Sweeney, Hazel Jean Taylor, Sylvia Rose Johnson, Vincent Steed, Ellen O. Henderson, James E. Bonds, Clarence O. Foster, Jr., Carlton M. Francis.

3. The applications of the children who, or whose parents or guardians, did not file in this Court by Wednesday, August 27, 1958, at 10 A.M. appropriate objections to the action of the School Board on August 18, 1958, denying their applications are denied. This action is taken in accordance with the School Board's understanding of the Court's Remarks contained in the last paragraph on page 9 of the mimeographed copy thereof. Those children are:

Bertram Armstrong, Stanley Armstrong, Hamilton Beale, Gwendolyn Beale, Jonathan Daugherty, Dorothy Fulton, Jacqueline Merritt, Bileroy Nixon, Jean E. Nixon, Robert F. Spencer, Jr., Randolph Johnson, Ronald Osborne, Rita Osborne, John Arthur Thompson, Roscoe C. Thompson, Samuel T. Holmes, Nina Jenkins.

LaNell Armstrong, Samuel C. Merritt, 3rd, Cornelius Beale, Grenda L. Robinson, Nathan Daugherty, William L. Garrison, Susan V. Nixon, Wesley A. Nixon, Vernon Privott, Elaine Williams, Norma Barbara Smith, Stanley Osborne, Mary Louise Thompson, Jimmie L. Thompson, Ronald W. Thompson, Betty Bonds, Anita Mayer.

4. The application of the objecting child who resides in a home nearer to the previously all-Negro school attended by him during the prior school year is denied. This action is taken in accordance with the School Board's understanding of the Court's Remarks contained in the first paragraph on page 10 of the mimeographed copy thereof. That child is:

Daniel Bryant

5. The applications of the objecting children whose scholastic achievements and abilities do not justify the transfers and enrollments sought by said children are denied. This action is taken in accordance with the School Board's understanding of the Court's Remarks contained in the first paragraph on page 13 of the mimeographed copy thereof. Those children are:

Brenda Maria Branch, Dorothy E. Tally, Cloyde Reese, Calvin E. Winston, William Henry Neville, Floyd Murden, Wilhelmina Scott, David Fitchett, Jr., Peter M. Jordan, Martha Jeanette Mayfield, Claude Copeland, James Clayton Collins, Calvin K. Richardson, Orbina King.

Carol Lenette Branch, Walter L. Bryant, Thomas E. Reese, Dorothy V. Deans, Elizabeth Herring, Robert Paige, Marion Scott, LeRoy W. Fitchett, Ruth Patricia Mayfield, Clifton Washington, Jr., Barbara Jean Faltz, James A. Richardson, Jr., Maxine Brown, Helen Geneva King.

6. The applications of the objecting children who seek to attend Norview Elementary School this school year (1958-'59) but who, if they do, will be transferred to the Rosemont Elementary School as of the beginning of the next school year (1959-'60), and who thus will be too frequently transferred, are denied. This action is taken in accordance with the School Board's understanding of the Court's Remarks contained in the paragraph beginning at the bottom of page 14 and continuing at the top of page 15 of the mimeographed copy thereof. Those children are:

Charlene L. Butts, Melvin G. Green, Jr., Rosa Mae Harris, Sharon Venita Smith, Minnie Alice Green, Cloraten Harris, Glenda Gale Brothers, Edward H. Smith, III.

The foregoing report purports to set forth the action of the School Board with respect to all of the said 151 applications and the School Board believes that it does so. If any application is omitted therefrom, such omission is the result of inadvertence and not of design.

Respectfully submitted,

THE SCHOOL BOARD
OF THE CITY OF
NORFOLK

By Paul T. Schweitzer,
Chairman.

Norfolk, Virginia
August 29, 1958

* * *

Judge's Comments of August 29, 1958

After the school board submitted its report, the following exchange was recorded in the court:

The Court: May I say, Mr. Cocke and gentlemen, that I, of course, am mindful of the action of the United States Supreme Court taken on yesterday in the case of Aaron against Cooper.

I assume that the text of the court's order, that is, the Supreme Court's order, is correctly stated in this morning's edition of The Virginian Pilot, which I have observed. Assuming the correctness of the verbatim transcript of that order, it appears to me that what the Supreme Court has done, by ordering argument on Sept. 11, 1958, on the school board's petition for writ of certiorari, contemplates an effective disposition of the case on its merits.

If the petition for certiorari is denied by the United States Supreme Court, after having heard several hours of argument on yesterday and then several hours of argument more on Sept. 11, I am, of course, then, bound, definitely bound, by the ruling of the Eighth Circuit in Aaron against Cooper.

If the petition for writ of certiorari is granted by the Supreme Court on Sept. 11, 1958, or within a day or two thereafter, as I can only judge that they contemplate acting at least prior to the opening of the school term or the proposed opening of the school term in Little Rock on Sept. 15, then the Supreme Court could do one of two things.

They could set the matter down for further argument, which I do not believe that they will do, because, as lawyers, we know that the Supreme Court has followed the practice for many years of sometimes granting a petition for certiorari and proceeding at the same time to reverse a lower court.

So I do not believe that, after they have heard these extensive arguments, they will grant certiorari and set it down for further argument. I believe that, from the language used in the order of the court, it would appear to me very clearly that they contemplate disposing of the case either on its merits or so nearly on its merits as to foreclose any further argument one way or another.

Now, I realize that there have been certain comments in the press and over the radio as to alleged statements that I made in the course of a colloquy between Judge Davis and the court on last Friday night, one week ago tonight.

As you gentlemen know, who are counsel in the case, my remarks to the school board on last Monday clearly indicated that if the Supreme Court granted a stay or did not grant a stay, that is, if they vacated the stay granted, I perhaps, should say, by the Eighth Circuit, or did not vacate the stay granted, in my opinion, it would make little or no difference as to this case.

However, I am still firmly of the opinion that if the Supreme Court of the United States reverses the Eighth Circuit, it would, by its action, in the Aaron against Cooper case, completely and effectively, from a practical standpoint, destroy the operation of, or the effective compliance of, Brown against the Board of Education.

No one need tell me that if all is required to block the carrying out of Brown against the Board of Education is some evidence of racial tension or some evidence of racial violence, such acts could clearly be brought into action without any trouble by various opponents of the Supreme Court decision, and if the Supreme Court feels that evidence of racial tension or racial violence is sufficient under the circumstances, then the court would be obliged to reconsider its actions. However, I might say that I presently have no intention of reconsidering any actions until I get word from the higher authority on the subject.

The school board, subject to such further individual cases as may be brought to the attention of the court by appropriate evidence, has certainly, on its face, complied with the court's remarks on last Monday. That is subject, of

course, to the right of counsel for the plaintiff to raise the question in individual cases, and which I cannot comment upon at this time; and the court contemplates proceeding under the assumption that the case of Aaron against Cooper was correctly decided by the United States Court of Appeals for the Eighth Circuit. However, the court will consider any action (and, as we all know, under the Virginia law the schools in question would be closed, I assume, in any event) and if the United States Supreme Court grants certiorari and proceeds to reverse the Eighth Circuit at the time or shortly after the arguments of Sept. 11, 1958, that would, undoubtedly, put a different complexion—a different picture—on this entire case.

I have no desire to, by any order of mine which may be questioned by the United States Supreme Court at an appropriate time, invite the acts of racial violence, which I know would be forthcoming if all that is necessary to be done would be to incite some racial violence to stop the effectiveness of the court decree, and if certiorari is granted—not the question of the vacation of the stay now—but if certiorari is granted, or if certiorari is granted and the decision is reversed, then, in that event, even though the school board may have complied, I would entertain then a motion for authority to transfer the children in question.

Do I make myself reasonably clear to counsel? I know that it will not be properly construed by the gentlemen who are in the quote and misquote business. But, nevertheless, do I make myself reasonably clear to counsel?

Mr. Cocke: Perfectly clear to one of counsel, if your Honor please. I imagine it is for all.

The Court: Do you have a question?

Mr. Davis: Your Honor, do I understand that that situation will exist if certiorari is granted subject?

The Court: If certiorari is granted and the Supreme Court of the United States again orders further argument, it is perfectly apparent to me that they would then have before it, or what would be working through their minds, a possible reconsideration of the entire matter because, as lawyers and as judges, and I think counsel for the plaintiff will agree, if all that is needed to defeat compliance with Brown against the board of education would be acts of racial violence, they would, in my opinion, be incited not by the school board members or their counsel—please do not misunderstand me—but they would, undoubtedly, be incited by other groups or organizations or individuals in an effort to defeat compliance with Brown against the Board of Education.

My prediction, such as it is, is that shortly after Sept. 11, 1958, the United States Supreme Court will either grant certiorari or reverse the Eighth Circuit Court, or will deny certiorari, which will then, I am sure, be an affirmance of the Eighth Circuit's decision.

* * *

Governor's Statement of September 4, 1958

On September 4, Gov. J. Lindsay Almond of Virginia wrote to certain school officials and board members clarifying the state's position relative to their pupil assignment and other duties.

From: The Governor of Virginia

To: Honorable J. J. Brewbaker
Superintendent of Schools, Norfolk
Honorable Ray E. Reid
Superintendent of Schools of Arlington County
Honorable Fendall R. Ellis
Superintendent of Schools, Charlottesville
Honorable T. J. McIlwaine
Superintendent of Schools of Prince Edward County

I would be pleased to have you deliver this statement to your School Board and Counsel:

There appears to be some misconception as to the responsibility, authority and accountability of District School Superintendents and local School Board members who are parties defendant in cases now pending in the Federal District Courts.

The heavy burden of grave responsibility devolving upon the Governor of this Commonwealth impels the following statement:

No decision of the Supreme Court of the United States or any subordinate Federal Court requires, or can require, this State or any of its political subdivisions to operate any public school whether integrated or not.

No such decision nor any State law requires any parent to send a child to an integrated school.

What the Supreme Court has said and all that it has said is that as to such schools as may be operated and maintained by State and/or local government no child may be excluded where the controlling factor for such exclusion is that of race.

The decrees in every case are decrees of injunction which restrain exclusion and are not decrees of mandamus compelling the operation of any school or the admittance, assignment or enrollment of any child. The decrees are in the negative and not in the affirmative.

[*No Affirmative Order*]

No Federal Court is vested with authority under the decision of the Supreme Court to direct, compel or coerce any defendant District Superintendent or School Board to assign or enroll any pupil in any school, or to do any affirmative administrative act pertaining thereto. The Court may assume the power but lacks the authority to make the assignment or enrollment itself.

Aside from the lack of authority of the Court to make the assignment or enrollment, the local School Board has been totally divested of all the authority it once had. This authority resides solely in the Pupil Placement Board. Whether the assignment made by the Pupil Placement Board would be respected by the Court is beside the point.

Refusal of the local Board to make assignments, an affirmative act not directed by the injunction decree, could not properly be adjudged in violation of the decree and thus form the basis for contempt proceedings.

Assignments made by a local Board would not only be ultra vires of the authority of the Board but would be in violation of State law. Superimposed upon these considerations, such affirmative act of assignment would constitute a voluntary act on the part of the local Board bringing upon it the onus of creating the condition which would invoke the applicable statute closing the school.

No School Board is faced with the necessity or is under any obligation to seek relief at the hands of any Federal Court from the binding effect of injunctions from State Courts of competent jurisdiction enjoining such Boards from assigning or enrolling pupils. Since a Federal Court has no authority to direct a School Board to violate such State injunction, a violation would be susceptible to the construction that it was voluntary and wilful.

I personally know and profoundly respect the interest and ability of able counsel for the various School Boards. As a lawyer, I know the office, function and obligation of counsel to client. I trust that the view of able counsel will be found in harmony with this statement.

It is after deliberate consideration and thought that I have concluded that the obligation of duty and official responsibility impels me to make it.

[*Desperate Straits*]

I am fully cognizant of the desperate straits—not of their own choosing—in which these Boards find themselves. I share their distress and applaud their honest efforts and their loyalty and devotion to our common cause to save public education for all of the children of Virginia.

I am deeply concerned that no charge be justifiably made that any School Board has thwarted the will of the overwhelming majority of the people of Virginia and thus brought into disfavor with the chosen representatives of the people in the General Assembly.

I am solemnly committed and irrevocably pledged to do everything within my power to defend and preserve public education for all of the children of the Commonwealth. Irrefutable evidence abundantly abounds that the mixing of the races in our public schools will isolate them from the support of our people, produce strife, bitterness, chaos and confusion to the utter destruction of any rational concept of a worthwhile public school system.

J. Lindsay Almond, Jr.
Governor.

cc: Pupil Placement Board
Honorable Davis Y. Paschall,
Superintendent of Public Instruction.

* * *

School Board Statement, Resolution of September 5

The next day, the Norfolk School Board adopted a resolution outlining developments and restating its plan to proceed with the program of July 17, and setting up procedures:

RESOLUTION

WHEREAS, by Resolution adopted July 17, 1958, The School Board of the City of Norfolk adopted certain standards, criteria and procedures relating to the assignment of pupils to public schools of the City of Norfolk; and

WHEREAS, said Resolution provided for the procedures set forth therein to be applicable "to all children who apply, or for whom applications are made, for transfer from any other school, either within or without the City of Norfolk, to any public school of the City of Norfolk heretofore attended only by students of the opposite race, or who apply, or for whom applications are made, for initial enrollment in any public school of the City of Norfolk heretofore attended only by students of the opposite race"; and

WHEREAS, said procedures are substantially the same as those which the administrative officials of the public schools of the City of Norfolk, with the informal approval of the School Board, have followed for many years in determining whether or not applications for transfers and initial enrollments which involved unusual circumstances should be granted, although such procedures had not been reduced to writing or formally adopted by the School Board prior to July 17, 1958; and

WHEREAS, it was the intent of the School Board, on July 17, 1958, that said administrative officials continue to follow substantially the same procedures as those set forth in said Resolution in determining whether or not applications for transfers and initial enrollments should be granted when they involve unusual circumstances other than those set forth in said Resolution; and

WHEREAS, it is now the judgment of the School Board that all applications for transfers and initial enrollments which involve unusual circumstances be handled in accordance with the procedures set forth in said Resolution;

NOW, THEREFORE, BE IT RESOLVED that the assignment procedures set forth in and adopted by a certain Resolution of this Board, a copy of which is attached hereto, adopted July 17, 1958, are hereby amended so as to read as follows, and, as so amended, are hereby readopted, effective as of July 17, 1958:

* * *

[Here the board attached a copy of the procedures adopted July 17, and printed at page 942, supra.]

* * *

ADOPTED: September 5, 1958

* * *

Negro Pupils Ordered Admitted; Board's Response

On September 18, the U.S. district court ordered the admission of the Negro students as listed in the board's report of August 28, *supra*. On the day following, the school board issued a statement announcing an appeal of the order, and outlining its assessment of the situation.

STATEMENT

The School Board has appealed from the rulings of the District Court under which seventeen colored children will have to be assigned to previously all white schools. Today the District Court declined to grant a suspension in the effectiveness of its ruling until the appeal can be heard on its merits. The Board will request Judge Sobeloff, Chief Judge of the Court of Appeals for the Fourth Circuit, to grant such a stay, but no appointment with Judge Sobeloff can be had before September 22, 1958. For this reason, the Board has delayed the opening of all junior and senior high schools in the City until September 29, 1958.

It is the understanding of the School Board that the following results will follow Judge Sobeloff's ruling:

(1) If the requested stay is granted, the junior and senior high schools will open on September 29 on a segregated basis as in former years.

(2) If the stay is denied by Judge Sobeloff, the School Board will have to assign the seventeen children in conformance with the District Court's rulings and Maury High School, Norview High School, Granby High School, Blair Junior High School, Northside Junior High School, and Norview Junior High School will be automatically closed.

(3) If these schools are closed, the buildings will be physically closed and there will be no necessity for any child, teacher, or administrative personnel to report to the school on the day that the rest of the high schools and junior high schools are opened.

Meanwhile all elementary schools will be opened on September 22, 1958, including any classes from the first through the sixth grade which are conducted in Willard and Norview Junior High School buildings.

* * *

Court of Appeals Affirms Order Admitting Negroes

On September 27, 1958, the Court of Appeals for the Fourth Circuit affirmed the order admitting the 17 Negroes. *(The School Board of the City of Norfolk, etc., et al. v. Leola Pearl Beckett, an infant, et al., etc. CA 7759).*

ORDER

ORDERED, this 27th day of September, 1958, by the United States Court of Appeals for the Fourth Circuit, that the Order of the District Court in the above-entitled case, entered September 18, 1958, be, and the same is hereby, affirmed, insofar as it directed the admission of seventeen pupils to the Norfolk schools.

It was agreed in open court by the attorneys in the case that the remaining provisions of the Order in respect to the admission of one hundred and thirty-four students to the Norfolk schools do not represent a final decision of the District Court, and this part of the case is, therefore, remanded to the District Court for further proceedings.

An opinion will be subsequently filed.

FURTHER ORDERED that, in lieu of a mandate, the Clerk of this Court forthwith transmit a certified copy of this Order to the Clerk of the United States District Court at Norfolk.

Simon E. Sobeloff
Chief Judge, 4th Circuit
Morris A. Soper
Clement F. Haynsworth, Jr.

* * *

Board Orders Negroes Admitted

On the same day, the school board ordered the admission of the 17 Negroes in specified white schools:

RESOLUTION

BE IT RESOLVED that the following children are hereby assigned to and enrolled in the grades and schools set opposite their names for the school year 1958-59:

Name	*Grade*	*School*
Patricia Godbolt	11	Norview High
Geraldine V. Tally	7H	Northside Jr.
Patricia A. Turner	8	Norview Jr.
James A. Turner, Jr.	7	Norview Jr.
Claudia Wellington	7	Norview Jr.
Carol J. Wellington	10	Norview High
LaVera Erlone Forbes	7	Norview Jr.
Betty Jean Reid	10	Granby High
Johnnie Anita Rouse	10	Norview High
Reginald Young	9	Blair Jr. High
Lolita Portis	7	Blair Jr. High
Alveraze F. Gonsulande	11	Norview High
Edward F. Jordan	7	Norview Jr.
Delores Johnson	11	Norview High
Olivia Driver	9	Norview High
Andrew I. Heidelberg	9	Norview High
Lewis Cousins	10	Maury High

ADOPTED: September 27, 1958

* * *

Governor Advised of Negroes' Admission

Later the same day, the school board sent a letter to the governor advising him of the admission of the Negroes, stating its understanding that such action automatically closed the schools, and urging his "best efforts to effect the reopening of these schools. . ."

The Honorable J. Lindsay Almond, Jr.
Governor of Virginia
Richmond, Virginia

Dear Governor Almond:

The United States Court of Appeals for the Fourth Circuit has today affirmed the judgment of the United States District Court in the action entitled Leola Pearl Becket, etc., et al, versus the School Board of the City of Norfolk, et al. Accordingly, the Norfolk City School Board has today adopted the following resolution:

"BE IT RESOLVED that the following children are hereby assigned to and enrolled in the grades and schools set opposite their names for the school year 1958-59:

Name	*Grade*	*School*
Patricia Godbolt	11	Norview High
Geraldine V. Tally	7H	Northside Jr.
Patricia A. Turner	8	Norview Jr.
James A. Turner, Jr.	7	Norview Jr.
Claudia Wellington	7	Norview Jr.
Carol J. Wellington	10	Norview High
LaVera Erlone Forbes	7	Norview Jr.
Betty Jean Reid	10	Granby High
Johnnie Anita Rouse	10	Norview High
Reginald Young	9	Blair Jr. High
Lolita Portis	7	Blair Jr. High
Alveraze F. Gonsulande	11	Norview High
Edward F. Jordan	7	Norview Jr.
Delores Johnson	11	Norview High
Olivia Driver	9	Norview High
Andrew I. Heidelberg	9	Norview High
Lewis Cousins	10	Maury High

ADOPTED: September 27, 1958"

It is the understanding of this Board that this action automatically closes the schools listed above pursuant to the State law and places them under your jurisdiction. We respectfully request that you utilize the best efforts of your office to effect the reopening of these schools at the earliest possible time.

Very sincerely yours,

THE SCHOOL BOARD
OF THE CITY OF
NORFOLK, VIRGINIA
/s/ Paul T. Schweitzer
Chairman

Governor Orders Closing of Schools

On receipt of the communication from the school board, the governor ordered the closing of the affected schools.

COMMONWEALTH OF VIRGINIA
Governor's Office
Richmond

September 27, 1958

From: The Governor of Virginia

To: Dr. J. J. Brewbaker, Superintendent of Norfolk City Schools, School Administration Building, Bank & Charlotte Streets, Norfolk, Virginia
Mr. Paul T. Schweitzer, Chairman, Box 7095, Norfolk, Virginia
Mr. William P. Ballard, Box 1111, Norfolk, Virginia
Mr. W. Farley Powers, Box 419, Norfolk, Virginia
Mr. Francis N. Crenshaw, Bank of Commerce Building, Norfolk, Virginia
Mrs. E. P. Dallas, 7700 Argyle Avenue, Norfolk, Virginia
Mr. Benjamin Willis, P. O. Box 3095, Norfolk, Virginia
Members of the School Board of the City of Norfolk

Under compulsion of an order issued by the United States District Court for the Eastern District of Virginia, both white and colored children have been enrolled effective September 29, 1958, in Granby, Maury and Norview High Schools and Blair, Northside and Norview Junior High Schools, located in the City of Norfolk.

Pursuant to the provisions of Chapter 9.1, Title 22, of the Code of Virginia, the above-named schools are closed and are removed from the public school system, effective September 29, 1958, and all authority, power and control over such schools, principals, teachers, and other employees and all pupils now enrolled or ordered to be enrolled, will thereupon be vested in the Commonwealth of Virginia, to be exercised by the Governor.

Accordingly, by virtue of the authority vested in me as chief executive of the Commonwealth of Virginia, I will thereupon assume all power and control over such schools and hereby request all local officials and all citizens to cooperate with the Department of State Police and local law enforcement officers in the protection of public property and the security of public peace and order.

You are requested to forthwith notify all teachers, and other personnel connected with such schools, and all parents and other persons having custody and care of all pupils enrolled in such schools, of this action.

Given under my hand, this the 27th day of September, 1958.

J. Lindsay Almond, Jr.
Governor

* * *

City Council Resolution of September 30, 1958

On September 30, the Norfolk City Council adopted a resolution urging steps be taken to reopen the affected schools:

A RESOLUTION requesting the Governor and the General Assembly of the Commonwealth of Virginia to take over and operate, pursuant to Chapter 69 of the Acts of the General Assembly 1956, Extra Session, certain secondary public schools in the City of Norfolk which have been closed.

WHEREAS, Section 129 of the Constitution of Virginia provides that the General Assembly shall establish and maintain an efficient system of public free schools; and

WHEREAS, six of the seven secondary public schools of the City of Norfolk in which white children are taught have been closed by operation of law; and

WHEREAS, it is the earnest desire of the

Council of the City of Norfolk that all such secondary schools in the City of Norfolk should continue to operate in order that none of the approximately ten thousand students should be delayed in securing the education prescribed and provided by law for them; and

WHEREAS, all of the secondary schools in which colored children are taught are in full operation; and

WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety of the City of Norfolk and to provide for the usual daily operation of the Department of Public Schools of the City of Norfolk, that the said closed secondary schools be immediately opened and operated pursuant to the Act of the General Assembly hereinafter referred to, an emergency is set forth and is declared to exist, pursuant to Section 15 of the Norfolk Charter of 1918;

NOW, THEREFORE, pursuant to Chapter 69 of the Acts of the General Assembly 1956, Extra Session, BE IT RESOLVED by the Council of the City of Norfolk, the local governing body, as follows:

1. That the Council of the City of Norfolk declares that by reason of the aforesaid an emergency is hereby declared to exist; and that there exists a need for such State operated public school system embracing such secondary schools as have been closed;
2. That the police powers of the Commonwealth of Virginia and Constitutional powers of the General Assembly hereby are requested to be invoked, as provided by the above Act of General Assembly;
3. That the City Clerk is directed to send promptly to the Keeper of the Rolls of the State of Virginia a properly certified copy of this resolution;
4. This resolution being an emergency resolution shall be in full force and effect on its adoption.

Adopted by the Council of the City of Norfolk, September 30th, 1958.

W. F. Duckworth,
President

EDUCATION
Public Schools—Virginia (Prince Edward)

Eva ALLEN, et al. v. County SCHOOL BOARD OF PRINCE EDWARD COUNTY, Virginia.

United States District Court, Eastern District, Virginia, August 4, 1958, 164 F.Supp. 786.

SUMMARY: One of the original *School Segregation Cases* (1 Race Rel. L. Rep. 5, 11) was returned with the mandate of the United States Supreme Court to the federal district court in Virginia. On the remand the three-judge district court entered a decree requiring the admission of Negro children to schools in Prince Edward County, Virginia, without discrimination on the basis of race and with all deliberate speed. The court retained jurisdiction of the case. *Davis v. School Board of Prince Edward County*, 1 Race Rel. L. Rep. 82, (E.D. Va. 1955). The plaintiffs then filed motions seeking an order to require the fixing of a definite time for desegregation of the county schools. Prior to action on these motions, the original three-judge court dissolved itself and turned over the supervision of the case to a single judge. 142 F.Supp. 616, 1 Race Rel. L. Rep. 1055 (1956). The defendants then filed a motion for dismissal of the case on the grounds that recently-enacted Virginia legislation had provided an adequate state remedy for the plaintiffs. After hearings the district court denied both the motion and the prior motions of the plaintiffs. The court held that the plaintiffs would not be required to exhaust the state remedies under the circumstances of this case. The court also held that present conditions in the county, including public opinion unfavorable to desegregation, required that it defer an order requiring desegregation. 149 F.Supp. 431, 2 Race Rel. L. Rep. 341 (1957). On appeal the Court of Appeals

for the Fourth Circuit reversed and remanded the case with directions to the district court to enter a decree requiring the abolition of racial discrimination in school admission policies "without further delay," stating, "we think that the District Judge was in error in not fixing a time limit for compliance." 249 F.2d. 462, 2 Race Rel. L. Rep. 1119 (4th Cir. 1957). In June, 1958, plaintiffs moved the district court to order compliance by defendants as of September, 1958. At a hearing on the motion, defendant's witnesses testified that racial relations in the county had deteriorated considerably since 1954 and expressed apprehension that the county might have "more trouble than Little Rock" if desegregation were then ordered to begin in September. Defendants also introduced a recent school board resolution authorizing employment of outside experts to conduct a survey and to counsel the board concerning the county's overall school problems, and the superintendent of schools testified that carrying out the terms of the resolution would be his next order of business. Defendant then moved the court to defer further action pending completion of the survey and subsequent formulation of plans by the board. The court reviewed experience in a number of historical incidents regarded as instructive and fixed ten years following the 1955 Supreme Court decision in the *Brown* case as the time for compliance. The court ordered preliminary steps toward the formulation of a plan of compliance meanwhile and directed defendants to report on or before January 1, 1959, their progress. The court reserved the power to accelerate or extend the date of compliance should the interest of the parties or the public call for it.

HUTCHESON, J.

This case comes before me again pursuant to a mandate from the United States Court of Appeals, Fourth Circuit, by *per curiam* opinion which is reported in 249 F.2d, 462. For a somewhat comprehensive history of the litigation, reference is made to my opinion reported in 149 F.Supp., 431. As will be seen from an examination of those opinions, when the case was last before me I heard evidence and reached the conclusion that in the exercise of discretion vested in the District Courts by the Supreme Court in the cases reported as Brown v. Board of Education, 347 U.S., 483, and 349 U.S., 294 (see also 345 U.S., 972), the interests of the litigants and of the public would not be best served by fixing a definite date upon which the defendants should comply with the order prohibiting segregation of children in the schools of Prince Edward County solely on account of race. An appeal was taken and in accordance with the opinion mentioned, the Court of Appeals reversed my decision and remanded the case to me with certain directions.

The case as now before the Court has the following issues presented for determination.

1. A motion to intervene filed by J. B. Minnick, argued on June 6, 1958, and renewed on July 21, 1958.
2. A controversy concerning taxable costs.
3. A motion filed by the plaintiffs, seeking the entry of an order directing the defendants to comply with the injunction heretofore entered at the beginning of the school term in September 1958, and a counter motion filed by the defendants for a general continuance pending a survey of the school problems in the County by an independent agency. These will be dealt with jointly.

These several matters will be considered in the order stated.

THE PETITION TO INTERVENE

The petitioner, J. B. Minnick, a practicing attorney of Arlington, Virginia, seeks to intervene in his own right as a citizen and in behalf of others similiarly affected and to have this Court re-examine certain constitutional issues. He contends that when this case, along with others known as the School Segregation Cases, and reported as Brown v. Board of Education, supra, was decided, the Supreme Court overlooked certain basic legal principles, particularly the statutes pertaining to land grant colleges and the provisions of the several acts admitting new states to the Union, with provision concerning operation of the schools of the state. I find it unnecessary to discuss the merits of his contentions. Whether these matters were called to the attention of the Supreme Court in these cases or were overlooked by that Court is beside the point. So far as this particular case is concerned, the law has been settled and it is too late for a review to be had in this proceed-

ing. It follows that the petition to intervene must be denied.

COSTS

The defendants question several items of costs which will be dealt with separately.

a. The plaintiffs seek the recovery of the sum of $215.00, expended for photographs showing the condition of the respective school buildings, which were filed as exhibits at the original hearing. They also claim an item of $500.00 paid to Dr. Thomas H. Henderson, an expert witness called by the plaintiffs, who testified with respect to the inequality of the educational facilities, and the sum of $725.00 as expert witness fees for Mrs. Evelyn W. Shaed, a statistician employed in the office of counsel for the plaintiffs. It appears clearly that under the rule followed by the Fourth Circuit in an opinion by Judge Parker in Specialty Equipment and Machinery Corporation v. Zell Motor Car Company, 193 F.2d, 515, at page 520, and cases cited, these items of cost should not be allowed. See also Henkel v. Chicago, 284 U.S., 444, and National Labor Relations Board v. School-Timer Frocks, Inc., Fourth Circuit No. 6981 (unreported).

b. The item of $446.40, witness fees allowed by the Clerk, is approved.

c. The defendants have withdrawn their objection to an item of $148.75, representing one-half of the cost of copies of certain records. It follows that this should be allowed.

d. Prior to the trial the defendants arranged with the court reporter to obtain daily transcripts of the proceedings. In accordance with the usual practice this was under a special arrangement with the reporter and he is permitted to make additional charges necessitated by the personnel required to furnish such service. Counsel for the plaintiffs with the approval of counsel for the defendant, arranged with the reporter to obtain a copy of the transcript, which, together with one-half of the per diem, amounted to $770.25. Plaintiffs contend that this item should be taxed as costs. While it is proper to tax as costs on appeal a copy of the transcript obtained by the prevailing party, this should be limited to the regular charges of the reporter for such transcript furnished in ordinary course and should not include the additional charge incident to the special service provided. It is therefore my conclusion that the plaintiffs should receive as a part of the taxable costs that portion of the item of $770.25 representing one copy of the transcript furnished in ordinary course.

THE MOTION OF THE PLAINTIFFS AND THE COUNTER MOTION OF THE DEFENDANTS

When the motion of the plaintiffs was filed on June 6, 1958, counsel for the defendants indicated their desire to be heard and July 14 was fixed as the time. At the hearing defendants offered affidavits, but upon suggestion of counsel for plaintiffs that they desired an opportunity to cross examine the witnesses, the defendants called the following residents of Prince Edward County: James T. Clark, Sheriff of Prince Edward County since March 1944, and prior to that time from February 1936 Deputy Sheriff, the successor in that office of his father, who had been Sheriff since the present Sheriff was five years of age; D. C. Womack, Commissioner of the Revenue of the County since January 1940, and prior to that time engaged in the wholesale grocery business in the County; Lester E. Andrews, a member of the School Board for four years and chairman during the last three, who is a retail lumber dealer; and B. Calvin Bass, now engaged in dairy farming at Rice, deputy chairman and former chairman of the School Board. Mr. Bass has had experience in teaching in the schools of the County and Hampden-Sydney College. He had teaching experience in Tennessee, including the position of School Principal and Assistant Superintendent. T. J. McIlwaine, who has been Superintendent of the schools for approximately forty-years, was offered for cross-examination, with the statement that his testimony would be corroborative of that already heard. He was then called by the plaintiffs under Rule 41 and cross examined.

These witnesses were unanimous in expressing the opinion that racial relations in the County have deteriorated to a marked degree since 1954. They believe that the effectiveness of the entire educational system in the County is suffering as a result of the atmosphere in which the schools are being operated. They express apprehension with respect to both violence and closing of the schools if the motion of the plaintiffs should be granted. The sheriff pointed to the necessity of maintaining order in the County having an area of 354 square miles, bisected by highways over which school buses travel. It is his opinion that the local enforcement officers,

reinforced by the entire state constabulary or highway patrol, would not be sufficient to maintain order if violence should erupt.

[*Objects of Censure*]

The conditions shown are to be deplored and those responsible may be the proper objects of censure if proper responsibility could be fixed. Considering the complexities of the entire problem this would present an impossible task, involving honest, sincere emotions felt by those on both sides of the controversy. However, we are faced with a situation rather than a theory and, being invested with a discretion in determining how this situation best may be met, it is necessary to seek a course to follow which appears in the best interest of all concerned at this time.

The defendants filed a copy of a recent resolution of the school board authorizing the employment of expert professional assistance in conducting a survey and counselling the board in connection with the entire school problem in the County. Superintendent McIlwaine has been charged with taking steps in this direction and testified that it is the next order of business with him. The plaintiffs offered no evidence.

At the conclusion of the testimony counsel for the defendants filed a motion that further action be deferred pending a survey, as referred to, and the consequent formulation of plans by the school board. The matter was then ably argued by counsel, the plaintiffs insisting that an order be entered directing a start toward compliance with the decree beginning in September 1958, and the defendants urging additional time within which to effect a plan of operation.

[*Not a Conventional Case*]

In approaching the problem it is well to bear in mind that this is not a law suit nor is it a cause in equity in the conventional sense. In the first, the Court lays down legal principles to guide the parties. In a proceeding in equity the chancellor formulates the rules to be applied. In this case the District Judge must be guided by broad, flexible principles of equity while acting as arbiter of policies to be formulated and carried out by the local school authorities.

As pointed out by the Court of Appeals, compliance with the order may be brought about in ways other than by mixing schools.[1] However, this is a matter for determination by the local authorities subject to approval or disapproval of the Court. Supposing that the Court was apprised of a solution, it would not be within its province to direct its adoption since the Court has only the authority to approve or disapprove the acts of the defendants.

As set out in my opinion filed January 1957, the Supreme Court did not lay down rules to be followed by the District Courts in solving the problem, but left a wide latitude for the exercise of discretion. An examination of the opinion of the Court of Appeals decided November 11, 1957, supra, reversing my decision, reveals that that tribunal has been equally abstentious in charting a course. That Court refrained from pointing to what it regarded as the fallacies of my reasoning. Consequently, I do not have the benefit of its view as to the particulars of my errors nor have I been granted the assistance which might have been afforded had that Court seen fit to expound its interpretation of the language of the Supreme Court in the Brown cases with which I am seeking to comply. The only light thrown upon the subject by the Court of Appeals is found in the following language:

> "; and we think that the District Judge was in error in not fixing a time limit for compliance with the order heretofore entered in the cause."

As authority for this conclusion the Court quoted from an opinion by the Chief Judge of the Fifth Circuit in Jackson v. Rawdon, 235 F.2d, 93, 96, to the effect that the plaintiffs there were entitled to have the defendants "* * * acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration * * *".

We turn to that opinion to ascertain what right the plaintiffs there were seeking to establish and find that it does not involve fixing a time limit to comply with an order. The plaintiffs there were seeking merely a declaration of their rights by the Court. The sentence in the opinion of the Chief Judge of the Fifth Circuit following the sentence partially quoted by the Fourth Circuit Court reads as follows:

1. That Court pointed to voluntary continuation of the present system as one method of meeting the requirement. 249 F.2d 462, at page 465.

> "Had the Court made such a declaration (of the constitutional rights of the plaintiffs) and retained the cause for further orders necessary to implement it, deferment to a later time of action on the prayer for injunctive relief, if necessary, may well have been within his discretion."

In my initial study of the Brown cases, I considered Jackson v. Rawdon and was influenced, in part, by that opinion in reaching my conclusion stated in January 1957, supra. Finally, the opinion of the Fourth Circuit concludes with directions that this Court enter an order directing the defendants to "make a prompt and reasonable start toward complying with the Court's order enjoining discrimination on the ground of race or color in admitting children to the schools under their supervision."

[*Time Not Specified*]

So, as is seen, the Court of Appeals has said in broad and general terms that I was in error in not fixing a time limit for compliance, that I should say plainly the defendants must comply without further delay and a prompt and reasonable start must be made. It is to be observed that the Court refrained from indicating what would be a proper time to fix, what act of compliance must be without further delay, and they have failed to define a prompt and reasonable start. It is clear that the Court recognizes what the Supreme Court announced, namely, that the responsibility is upon the District Court to pass upon the details. Working out the details is not an assignment of a minor nature and if I am to use that discretion called for by the Supreme Court, recognized by the Court of Appeals and which should motivate a chancellor in applying equitable principles, the difficulties must be recognized.

In this state of affairs I feel that it is proper that I further discuss the problem and give my reasons for the conclusions to be stated. The Court of Appeals says correctly that the enforcement of a right may not be denied because of action taken or threatened in defiance of such right. But the Supreme Court has announced in an epochal opinion that the exercise of a right guaranteed by the Constitution of the United States may be deferred until necessary local adjustments in the public interest may be effected. It is clear that the Court did not anticipate hurried, ill action. Judging from the experience of other localities it may be observed that violence may be within the realm of probability if precipitate action is taken. While this consideration of itself is secondary the psychological effect of such conditions upon immature children is of primary importance. It must be ever borne in mind that the children are those for whom the entire educational system was devised and their interests are not to be lost sight of in the conflicts of the adult world in which they live.

[*Relies on* Rippy *Case*]

So far as I have been able to ascertain, the nearest analogy afforded by decided cases is that of Rippy v. Borders, 250 F.2d, 690 decided in December, 1957 by the Fifth Circuit. Stripped of legal and procedural niceties it appears that the District Court twice declined to order compliance with the decision in the Brown cases. Twice he was reversed. He then entered an order fixing the midwinter term in January 1958 as the time for compliance and again he was reversed. See 133 F.Supp. 811, 233 F.2d 796, 145 F.Supp. 485, 247 F.2d, 268, 250 F.2d 690. For a concise statement of the history of this litigation see also 3 Race Rel. Law Rep. 17. It is quite true that the facts in that case may be distinguished from those in the instant case, but the Court of Appeals there made it clear that "the authority to administer the public schools is vested in the appellants, the Board and the Superintendent and, of course, they are the ones required to make the necessary arrangements referred to in the judgment to be entered by the District Court as directed by our mandate". After stating that should the local authorities fail to meet their primary responsibility, then the duty will devolve upon the District Court to hold a hearing and proceed so as to require compliance, the Court used the following language:

> "In the performance of their duty, the District Court must exercise *its own* judgment and discretion in accordance with the applicable principles of law set forth in Brown v. Board of Education of Topeka, supra." (Emphasis by the Court).

In the argument before me it was urged that since the local authorities have not adopted a plan, an order directing immediate compliance should be entered upon the theory that the

Court under these conditions would not be responsible for the consequence which might result. I am unable to agree that this would be a proper discharge of the responsibility placed upon the Court. In his dissenting opinion in the case of Sharp v. Lucky, 252 F.2d, 910, at 924, Circuit Judge Ben F. Cameron, of the Fifth Circuit, aptly stated the responsibility resting upon the District Judges. In referring to the period in the life of the Nation which has become well known as "The Tragic Era" from the title given his book by Claude G. Bowers[2], Judge Cameron said:

> "This sad epoch in our history was fomented in no small part, by well-intentioned men in too much of a hurry. The basic lesson wise men have learned from its excesses and its tragedies is that civil rights can be insured and protected only by local government administered by men with a sympathetic understanding of the many facets of the problems involved; men who approach their task in a spirit of friendship and local obligation. Government can succeed only when its mandates deserve and command the respect and the consent of the governed.
>
> "If we, in whose hands responsibility for leadership and judgment is placed, open our eyes to the teachings of history and perform our duties with patience, with sympathy and with common sense, we shall make a contribution toward averting a repetition of an epoch from which nobody derived any benefit and in which everybody suffered."

To this might be added the warning that if we make mistakes by impatience and failure to consider and to endeavor to understand, however good our intentions may be, we are responsible for the consequences because that responsibility has been placed upon us by the Supreme Court. For my part, I believe much harm can be caused by ill-considered action. The conditions which have arisen in other places constitute a warning which should not be ignored.

We hear such terms as "the jet age", "a new day" and "crash programs" used as excuses for speedy action. These catch phrases are not consistent with the "deliberate speed", the "unhurrying chase" ascribed by Thompson to his Hound of Heaven. Furthermore, they are not applicable to the situation with which we are dealing. Despite the great advances made in scientific and technical knowledge we have no evidence upon which to base a belief that in accepting new theories of social or moral reform the modern human mind is any more adaptable than that of the Athenian of 500 B.C. The knowledge of preceding generations can be preserved in writings but wisdom cannot be transmitted by inheritance. It must be acquired by experience.

[*Must Refer to History*]

In dealing with problems accompanying such reforms we must look to the teachings of history if we are to avoid treacherous shoals. History affords many lessons we would do well to heed.

We find that following the adoption of his code of laws, Solon, in order to afford a period for its acceptance by the people and to avoid importunities for interpretation, modification, etc., absented himself for ten years during which he visited foreign countries. Upon his return there yet remained much to be done.[3]

Later we find the admonition of The Great Teacher that morality cannot be enforced by Pharisaic legalism. He pointed to the truth that the application of external force will not "cleanse" ** that which is within the cup and platter[4], the essential first step in reform.

Innumerable illustrations might be used. Among more modern cases, reference has already been made to the period in the history of our country known as "The Tragic Era", which has also been called "The Age of Hate".[5]

[*Code of Morality*]

Within the memory of many of us, this Nation embarked upon a sudden and determined effort to enforce upon the people a code of morality adopted as an amendment to the Constitution of the United States. It was designed to reform the customs of the Nation in the use

2. "The Tragic Era—The Revolution after Lincoln" 1929 The Riverside Press, Cambridge, Mass.

3. Plutarch relates that: "And, therefore, when he (Solon) was afterwards asked if he had left the Athenians the best laws that could be given, he replied, 'The best they could receive'." Plutarch's Lives—McKinlay, Stone and MacKenzie—1924.
4. Matthew 23:25, 26
5. "The Age of Hate: Andrew Johnson and the Radicals"—George Fort Milton. New York. Coward-McCann, Inc.—1930.

of intoxicating liquors and it was called "The Noble Experiment". To assist the Government in its enforcement a nationwide moral crusade was waged by private enterprise and religious organizations. The failure of the experiment is too well known to require discussion. That action was too precipitate. There had not been a sufficient preparatory cleansing of the inside "of the cup and of the platter". Contrary to the situation before us, there was no provision for flexibility of enforcement. The history of civilization is a story of trial and error. We have here a more reasonable rule to follow than that which prevailed under the 18th Amendment and the statutes enacted under that Amendment. Within the bounds of this rule latitude is allowed for meeting conditions in a practical manner in the search for the correct solution.

It should be pointed out that in none of the episodes referred to was the emotional appeal more deeply seated or based upon more honest convictions of right on both sides to the controversy than in the situation before us nor was the impact more far reaching.

It has been demonstrated that the hearts and the minds of men cannot be controlled by legislation nor by force. It has been demonstrated that violence can be quelled by force, such as the use of troops, but unless proper preliminary preparation has been had, when the force is removed festering scars remain requiring treatment of the type administered by Judge Harry J. Lemley of the Eastern District of Arkansas in his recent opinion in Aaron v. Cooper, Civil Action 3113, filed June 21, 1958, known as the Little Rock Case. It is realized that these observations may appear trite, but in periods of stress we often need to recall to mind and to be guided by simple truths, which we are prone to overlook at times.

It is belaboring the point to again call attention to the obvious fact that the Supreme Court recognized all this as disclosed by its language in the Brown cases. A reading of those opinions clearly reveals that the Court should not confuse delay with defiance of or noncompliance with the law. The law must be observed and the questions here to be determined relate only to the method and time of such observance. Over-hasty action necessitating a backward step is less conducive to proper law enforcement than action taken after carefully considered delay, even though the Court may be criticized for delay by those impatiently urging action.

[*Should Proceed Promptly*]

The defendants should proceed promptly with the formulation of a plan which will comply with the order heretofore entered enjoining them from discriminating against the plaintiffs in admission to the schools in the County solely on account of race. They have indicated their purpose to so proceed.

The proposal of the defendants that a comprehensive survey of the entire problem be made by experts trained in the subjects involved is, so far as I am informed, an approach which has not been tried elsewhere. Considering the weight and importance which have been given psychological and sociological factors, such an approach would appear to have merit and to contain the possibility of a worthwhile recommendation dealing with the problems peculiar to the particular community with which we are concerned.

I do not conceive it to be within the province of the Court to specify what steps the defendants should take but deem it not inappropriate to make this comment concerning their proposal. As declared by the Supreme Court in the Brown Cases and by the Fifth Circuit in Rippy v. Borders, the primary responsibility is theirs and the function of this Court is to either approve or disapprove their actions.

The Court of Appeals has directed that a date be fixed for compliance with the mandate.

In determining what would be a proper time to fix for compliance, a number of factors and some precedents have been considered. Obviously, it is not in the best interest of those concerned to comply with the suggestion of the plaintiffs that compliance be had with the beginning of the school year in September 1958. Such a course would be unrealistic. It is equally obvious that at this time there is no evidence before the Court upon which to base an opinion as to what would be a proper time. It is anticipated that progress reports to be made by the defendants in the future will throw light upon this phase of the problem. Turning again to precedent available in somewhat comparable situations, it is recalled that Solon considered ten years an appropriate interval to allow for adjustments to far-reaching changes in the customs of a people. The period of greatest turmoil

following the death of President Lincoln, is regarded as about twelve years. The efforts to enforce the 18th Amendment were concentrated over a period of some twelve or fourteen years. Concededly, these yardsticks are of limited aid but they do reflect some past experience with human behavior. No better measure has been suggested nor had one occurred to me. As I have pointed out previously, it is not possible for a Court to forecast conditions which will exist in the future. It can only find facts which exist at a stated time, past or present.[6] In full realization of this limitation but faced with directions from the Court of Appeals to fix a date and believing that some assurance of stability of conditions in the immediate future may be beneficial to the people of the County, in their efforts to meet the changed conditions, I fix ten years following the 1955 decision in the Brown cases as the time for such compliance. However, because of the uncertainty of conditions during the interval and the absence at this time of a sound basis for this conclusion, the power to change this date by either reducing or extending the time will be expressly reserved and action under such reservation will be in accord with what may develop in the future.

6. 149 F. Supp. 431, at page 439.

[*Immediate Planning Start*]

An order will be entered directing an immediate start in the necessary preliminary steps looking to the formulation of a plan, with directions that on or before January 1, 1959, the defendants inform the Court concerning proggress to that date. The report should reflect the qualifications of such consultant or consultants as have then been engaged. The order will direct compliance with the terms of the injunction heretofore entered at the beginning of the school year for 1965, unless such order should be modified during the interval, The order will expressly reserve to the Court the power to modify it by accelerating or extending the date of compliance and in such other respects as the best interest of the parties and of the public may appear proper including the power to direct additional reports from time to time as may be deemed appropriate.

EDUCATION
Public Schools—Virginia (Richmond)

Stephen WARDEN, et al. v. RICHMOND SCHOOL BOARD

United States District Court, Eastern District, Virginia, September 11, 1958, Civil No. ———.

SUMMARY: Six Negro school children in Richmond, Virginia, filed suit in federal district court seeking an interlocutory injunction ordering their admission to previously white schools. The school board asked for the dismissal of the suit, contending that the state Pupil Placement Board should have been named a party to the suit because the state board, and not the local one, has sole authority to enroll and assign pupils under the Virginia placement statute. The court refused to grant the interlocutory injunction and withheld action on the school board's motion. (For another Richmond school case, see *Calloway v. Farley*, 2 Race Rel. L. Rep. 1121 [E.D.Va., 1957]).

HUTCHESON, J.

Upon consideration of the facts shown by the evidence and the argument of counsel, it is my conclusion that the plaintiffs have failed to show a case proper for the exercise of the extraordinary remedy of an interlocutory injunction pending the final determination of this cause on its merits.

Therefore, the motion for an interlocutory injunction is denied.

EDUCATION
Public Schools—Virginia (Warren County)

Betty KILBY, etc., et al., v. The COUNTY SCHOOL BOARD OF WARREN COUNTY, VIRGINIA, et al.

United States District Court, Western District, Virginia, Civil Action 530.

SUMMARY: In July, 1958, a number of Negro students in Warren County, Virginia, made application to attend white schools. The county school board referred the applications to the state Pupil Placement Board. On August 29, the state board announced that all had been rejected. On the same day, attorneys for the Negro students and their parents filed a desegregation suit, asking an injunction requiring admission of the named plaintiffs. On September 8, the district court, Paul, J., issued the injunction, but postponed the effective date until the Court of Appeals for the Fourth Circuit could act. On September 12, Judge Simon Sobeloff of the Court of Appeals refused to stay the effective date of the injunction until the full court could act. The same day, the governor of Virginia ordered the schools closed. On September 27, the full Court of Appeals affirmed the injunction order of September 8. A move was then started in the county to operate private schools with city-paid teachers. On motion of the Negro plaintiffs, the district court on October 9 enjoined payment of teachers from public funds. Reproduced below are the injunction issued in the district court, the governor's closing the schools, the Court of Appeals order affirming the injunction by the district court and the injunction of October 9.

Order Closing School

Under compulsion of an order issued by the United States District Court for the Western District of Virginia, both white and colored children have been enrolled effective Sept. 15, 1958, in the Warren County High School, located in the county of Warren.

Pursuant to the provisions of Chapter 9.1 of the Code of Virginia, the Warren County High School is closed and is removed from the public school system, effective Sept. 15, 1958, and all authority, power and control over such school, its principal, teachers, other employes and all pupils now enrolled or ordered to be enrolled, will thereupon be vested in the commonwealth of Virginia, to be exercised by the Governor.

Accordingly, by virtue of the authority vested in me as chief executive of the commonwealth of Virginia, I will thereupon assume all power and control over such school and hereby request all local officials and all citizens to cooperate with the Department of State Police and local law enforcement officers in the protection of public property and the security of public peace and order.

You are requested to forthwith notify all teachers, and other personnel connected with such school, and all parents and other persons having the custody and care of all pupils enrolled or ordered to be enrolled in such school, of this action.

J. Lindsey Almond

Court of Appeals Order

ORDERED, this 27th day of September, 1958, by the United States Court of Appeals for the Fourth Circuit, that the Order of the District Court in the above-entitled case, entered September 8, 1958, be, and the same is hereby, affirmed.

An opinion will be subsequently filed.

FURTHER ORDERED that, in lieu of a mandate, the Clerk of this Court forthwith transmit a certified copy of this Order to the Clerk of the United States District Court at Harrisonburg.

s/ Simon E. Sobeloff
Chief Judge, Fourth Circuit

s/ Morris A. Soper
Circuit Judge

s/ Clement F. Haynsworth, Jr.
Circuit Judge

District Court Order of October 9

PAUL, J.

Upon consideration of the motion filed herein to intervene additional parties plaintiff, it appearing that defendants do not object thereto, and upon consideration of plaintiffs' motion for further relief filed herein on October 4, 1958, it is by the Court this 9th day of October, 1958, ADJUDGED, ORDERED AND DECREED

1. That the motion to intervene additional parties plaintiff be and it is hereby granted.

2. That the defendants, their agents, servants or successors be and they are hereby restrained and enjoined until the further order of this Court from permitting or allowing their employees, while being paid out of public funds, their facilities, or their equipment to be used in the education or instruction of pupils eligible for admission, enrollment or education in the Warren County High School, unless such instruction or education is afforded to plaintiffs on a racial nondiscriminatory basis in compliance with this Court's previous orders herein.

3. That this order be and become effective as of Wednesday, 15th October 1958.

EDUCATION
School Buses—Maryland

Gilbert G. HART, Jr. Minor, by Mrs. Gilbert G. Hart, Sr., his mother and next friend, v. BOARD OF EDUCATION OF CHARLES COUNTY; Frank B. Wade, President; Mrs. Mary B. Jerkins, Vice-President; Mrs. Frances Dobson; Mosher Wells; Mrs. Dorothea Rees and C. Paul Barnhart, Superintendent of Schools of Charles County.

United States District Court, District of Maryland, August 19, 1958, 164 F.Supp. 501.

SUMMARY: Charles County, Maryland, in 1956 instituted in its public schools a gradual desegregation policy, designed to desegregate one grade a year, beginning with the first grade. In July, 1957, application was made on behalf of a Negro boy who was enrolled in a desegregated school, but who was transported to the school in a segregated school bus, to ride the "white" school bus which passed his home. The Superintendent of Schools refused the request pursuant to a policy of the County Board of Education not to desegregate school bus transportation pending additional integration experience in the classroom. The State Board of Education dismissed an appeal, declaring that good faith had been exercised by the county superintendent in applying the policy of the county board and that the constitutionality of the policy was a legal question not within the power of the State Board to decide. 3 Race Rel. L. Rep. 561. On April 3, 1958, the boy filed a class action in the federal district court for Maryland against the County Board and Superintendent. On April 23, 1958, the County Board announced that henceforth transportation questions would be decided by it on an individual basis; and on June 18, 1958, the Board notified the plaintiff that transportation for him on a desegregated bus had been approved. Defendants in the federal court action then sought to have it dismissed as moot, but the plaintiff sought to have it continued as a class action. The court dismissed the action as moot, pointing out that the plaintiff, who had obtained the relief he sought for himself, was the only present member of his class since he was the only Negro child attending a desegregated school in the county who was entitled to transportation.

THOMSEN, Chief Judge.

Charles County, in Southern Maryland, began to desegregate its public schools in 1956, one grade a year, starting with the first grade. Four Negro children were admitted to the Indian Head Elementary School in the fall of 1956. Two dropped out during the year, but the other

two have persisted; with the approval of their parents and teachers they repeated the first grade and will enter the second grade this fall. No Negro child applied for admission to any white school in the fall of 1957, but another Negro child will enter the first grade at Indian Head this September. Two of the three children live within a block of the school. The third child, who lives a mile away, and who completed the first grade at Indian Head last year, has heretofore been furnished transportation on a bus which regularly serves a Negro school but which passes both his home and the Indian Head school. In July, 1957, the parents of that child, who is the infant plaintiff in this action, requested that he be furnished transportation on one of the buses which carry white children to Indian Head. The Superintendent of Schools refused that request, in accordance with the policy of the County Board of Education, who believed that it would be unwise to desegregate school bus transportation until after the children had had some experience of desegregation in the classrooms, under the supervision of teachers and principals. Plaintiff's parents then appealed to the State Board of Education, which granted a hearing, but ruled that "the question of whether the policy of the County Board violates the constitutional rights of the appellants in this case is not within the scope of the powers of the State Board of Education, since it is a purely legal question". 3 Race Rel. L. Rep. 561. The State Board dismissed the appeal.

[*Policy Modified*]

On April 3, 1958, the infant plaintiff, by his mother and next friend, filed this action on his own behalf and on behalf of all other Negroes similarly situated. On April 23, 1958, the County Board modified its transportation policy, as follows: "The question of transportation of a child accepted for enrollment in a school other than the one he normally would attend will be decided by the Board of Education on an individual basis". On June 18, 1958, the Superintendent notified plaintiff's parents that the Board had "approved transportation for him on one of the regular buses serving the Indian Head Elementary School effective September, 1958."

Defendants now seek to have the instant action dismissed as moot. Plaintiffs seek to have it continued as a class action.

The transportation problem in Charles County is complicated by a number of factors. Some buses carry only elementary school children, some carry children of all grades. Some children are carried directly from home to school, but some are left at transfer points for as much as half an hour. The bus drivers have no disciplinary powers over the children; there has been considerable vandalism on the buses, and it has been difficult to keep order at the transfer points. Under an agreement with the Board of County Commissioners, the Board of Education supplies transportation on its buses to a large number of parochial school pupils, over whom the Board of Education has no control. Under these circumstances, defendants maintained segregation of the races on the buses last year except on special trips where the children were accompanied by parents or a teacher. But transportation will now be furnished to the infant plaintiff on a bus which carries only elementary grade pupils directly to a single school.

[*Relief Obtained*]

The infant plaintiff has thus obtained the relief which he sought for himself. His counsel argue, however, that the action is also a class action, and that the class consists of "all Negro children in Charles County, attending or desiring to attend 'white' public schools in which case transportation by means of a 'white school bus' is afforded white children similarly situated". In fact, plaintiff is the only Negro child attending a desegregated school who is entitled to transportation. There is no evidence that there are any other Negro children who desire to attend such a school and who would be entitled to transportation. In other words, plaintiff is the only member of the alleged class. Future cases may involve different administrative problems. It would be most unwise for this court to lay down general rules to govern hypothetical cases which may or may not arise in the future. Gray v. Board of Trustees, 1952, 342 U.S. 517; Clark v. Flory, 4 Cir., 237 F.2d 597.

Plaintiff's counsel also suggest that the plaintiff himself may be denied desegregated transportation in the future, and that the case therefore should be kept open. But there is no reason to believe that defendants will change their decision; if they do this court will grant plaintiff a prompt hearing.

This action will be dismissed as moot; all costs to be paid by defendants.

EDUCATION
Teachers—Maryland

Delitha A. WEST v. BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY and William S. Schmidt, County Superintendent of Schools.

United States District Court, District of Maryland, September 16, 1958, 165 F.Supp. 382.

SUMMARY: A Negro school teacher sued the Prince George's County, Maryland, Board of Education and the County Superintendent of Schools in federal district court, claiming that her rights under the Fourteenth Amendment and the Federal Civil Rights Act had been violated in that she had received less salary than she should have received for her teaching since 1924 because of discrimination between white and Negro teachers. She asked for damages, an injunction, and declaratory relief. Plaintiff, who had no college degree, held a certificate entitling her to advances in the salary schedule for teachers without degrees, if she had been rated "first class" by the superintendent. Under a 1916 statute, the superintendent was required to classify certificates as first or second class according to specified standards. Before 1941, however, the statute was applied only to white teachers, and Negro teachers were paid under a lower, separate scale. After this arrangement was declared unconstitutional, a uniform arrangement was enacted in 1941. Most Negro teachers with at least one year of experience were rated first class by the end of 1940-1948 period, but plaintiff was not until 1949. She has held that rating ever since. The court found that her failure to receive a first class rating earlier was not due to prejudice but to the fact that neither the County nor State Supervisor of Colored Schools believed that she met the statutory requirements. Moreover, the court held that for any error by the County Superintendent in rating during that period, plaintiff's remedy lay in an appeal to the State Board of Education. As to the period before 1940, the court held that, even if plaintiff had suffered legal injuries from discriminatory practices, the statute of limitations barred her claim. The court also refused an injunction, noting that plaintiff was to draw during 1958-59 the highest salary which a non-degree teacher could receive, and that every Negro teacher in the county had achieved a first-class rating, both facts evidencing a present lack of discrimination.

THOMSEN, Chief Judge

Plaintiff, a Negro school teacher in Prince George's County, Maryland, has sued the County Board of Education and the County Superintendent of Schools, claiming that as a result of discrimination between white and Negro teachers over the years since she began teaching in 1924 she has been receiving less salary than she should have received. She seeks: a decree declaring that the alleged discrimination violates the equal protection and the due process clauses of the Fourteenth Amendment; a declaration that the alleged discrimination violates R.S. 1977, 42 U.S.C.A. 1981 and 1983, formerly 8 U.S.C.A. 41 and 43; an injunction restraining defendants from making any distinction solely on the grounds of race or color in the fixing of salaries; $15,600 back salary; $50,000 for mental pain and suffering; and $100,000 as punitive damages.

Defendants deny that they have discriminated between white and colored teachers since the adoption of a uniform salary scale in 1940. Defendants also raise as defenses: limitations; laches; failure to comply with the notice requirements of Art. 57, sec. 18 of the Maryland Code [1]; and failure to exhaust administrative remedies.

Plaintiff has been teaching in the public schools of Prince George's County since 1924. During the entire period from 1924 until this action was filed in February, 1956, she was a principal in charge of a small school; she was therefore entitled to receive and did receive an additional annual salary of some $200 to $500. She has taken many college grade courses, but has never received a degree.

[*Various Types of Certificates*]

The State Board of Education issues and has issued over the years various types of certificates to teachers. During all material times plaintiff has held either a first grade certificate or an advanced first grade certificate, both of which would entitle her to move up step by step on

1. Unless otherwise indicated all code references are to the 1951 edition of Flack's Annotated Code of Maryland.

the salary schedule for teachers without degrees, provided she was rated first class by the county superintendent pursuant to sec. 100 of Art. 77. That section reads, and has read since 1916:

> "Teachers' certificates shall be of two classes: first class and second class. All teachers' certificates issued by the state superintendent of schools shall, when issued, be of the second class, and shall be subject to classification by the county superintendent. The certificates of all the teachers employed shall be classified by the county superintendent, not less than once in two years. In determining the class of the certificate of a particular teacher the following points are to be considered: (a) Scholarship; (b) executive ability; (c) personality; and (d) teaching power. The county superintendent may add such other requirements as are approved by the superintendent of public education. The county superintendent shall keep a record of the kind, grade and class of certificate held by each teacher employed in the county, and on or before the first day of October each year, he shall submit to the county board of education a list of all the teachers employed, together with the kind, grade and class of their certificates, and a copy of this report shall be transmitted to the state superintendent of schools."

Before the Act of 1941, ch. 515, was adopted, Sec. 100 applied only to white teachers. A separate salary scale was provided for colored teachers, which was below the salary scale provided for white teachers and did not require a rating of colored teachers as either first or second class. This arrangement was declared unconstitutional by Judge Chesnut in Mills v. Board of Education of Anne Arundel County, et al., D.Md., November 22, 1939, 30 F.Supp. 245. Following that decision, a new uniform salary scale was prescribed by the Act of 1941, ch. 515, and subsequent statutes.[2] See Code, Art. 77, sec. 102.

2. New minimum salary schedules were adopted by the General Assembly by the Acts of 1945, ch. 543, Acts of 1947, ch. 535, Acts of 1953, ch. 263, and Acts of 1955, ch. 380. Since this suit was filed, a new statute known as the Acts of 1958, ch. 1, has been passed over the Governor's veto. It is not necessary to go into the details of these statutes beyond saying that they all give credit for varying amounts of training and for "successful" experience, i.e. first class rating.

To carry out the new policy, the supervisors of colored schools were asked to recommend to the county superintendents which colored teachers should be rated first class, which second class, and which third class (to be dropped). The County Superintendent for Prince George's County was given authority to allow up to eight years credit for past "successful" experience to all teachers who were rated first class in 1940.

[*"Elements" Listed*]

The supervisors of colored schools from all over the State met and prepared a list of the "elements" they felt should be considered in rating colored teachers. This list contained more items than Sec. 100, but it is doubtful whether any "element" in the list was not fairly embraced by the four criteria specified in Sec. 100, quoted above. There is no evidence that the items in the list were approved as additional requirements by the State Superintendent of Public Education, but use of the list was approved by the County Superintendent for Prince George's County. I accept the testimony of the County Supervisor of Colored Schools, himself a Negro, that the list was prepared to help Negro teachers understand the points which the supervisors would consider, and not in an effort to set up a different set of hurdles for Negro teachers from those provided for white teachers.

The Supervisor of Colored Schools for Prince George's County recommended about thirty out of ninety colored teachers in that county for first class rating. The Superintendent, however, rated only eleven of those colored teachers first class; he allowed each of those eleven credits for eight years past successful experience. The Supervisor recommended in July, 1940, that plaintiff be rated second class, and she was so rated by the then County Superintendent.

[*Discrimination in Ratings*]

During the years 1940 to 1943, inclusive, there was discrimination against colored teachers in the matter of first class ratings. After Mr. Shugart became County Superintendent in 1944, he inaugurated a policy of increasing as fast as he considered practicable the number of Negroes receiving first class ratings. For the first few years he gave such ratings to the older teachers so that they would receive greater benefits upon retirement. By 1949, 65% of all Negro teachers with at least one year's experi-

ence had received first class ratings; by 1953, when the defendant Schmidt had been County Superintendent for one year, only one such Negro teacher was rated second class.

At the present time, because of the increase in size of the county school system, the teachers are rated by their respective principals. Everyone of the more than two hundred Negro teachers with at least one year's experience is rated first class, while fifty-three such white teachers are rated second class.

After each school year ending in 1940 to 1948, inclusive, plaintiff was rated second class by the successive county superintendents. I find as a fact, however, that the failure of plaintiff to receive a first class rating during the years 1940 to 1948, inclusive, was not due to prejudice against Negroes but was due primarily to the fact that neither the Negro Supervisor of Colored Schools in Prince George's County nor the white State Supervisor of Colored Schools believed that she met the requirements for a first class teacher, as set out in Sec. 100.

At the end of the 1948-49 school year, plaintiff was rated first class, and has been rated first class ever since, moving up the salary scale step by step since that time; but, until now, she has been on a lower step than she would have been had she been rated first class before July, 1949. For the year 1958-59, however, plaintiff will be on the highest step ($5,200) of the salary schedule for teachers without degrees.

Nicholas Orem, who was Superintendent of Schools for Prince George's County from 1921 until 1943, G. Gardner Shugart, who held that office from 1943 to 1951, and J. Walter Huffington, who was State Supervisor of Colored Schools during most of the 1940s, all died before this suit was instituted.

1. Plaintiff's prayers for a declaratory decree. It is true, of course, that discrimination by the state or by county school officials between white and colored teachers on account of race or color violates the Fourteenth Amendment and 42 U.S.C.A. 1981. But it does not follow that because positions are equivalent the particular persons filling them are necessarily equal in professional attainments and efficiency; some range of discretion in determining actual salaries for particular teachers is permissible, so long as the distinction is not made on a proscribed basis. Mills v. Board of Education of Anne Arundel County, 30 F.Supp. at 249.

2. Plaintiff's claim for back salary. There was discrimination against all colored teachers, including plaintiff, before 1940. The state law did permit them to be rated first class. Colored teachers were rated for the first time in the summer of 1940, and plaintiff was rated second class. I have found as a fact that the reason plaintiff was rated second class rather than first class during the years 1940 to 1948, inclusive, was not because of her race or color, but because her supervisors and her superintendent did not believe she was entitled to a first class rating under Sec. 100 during those years. So, even though there may have been some discrimination against Negro teachers generally during some or all of the years 1940 to 1948, which injured some Negro teachers, plaintiff herself suffered no injury therefrom.

It is true that during all school years from 1924-25 to 1957-58 plaintiff has received less salary than she would have received if she had been rated first class during the years before 1940 when colored teachers were not rated. Plaintiff did not show that she would have been or should have been rated first class during any of the years before 1940; it would be impossible for her to show that at this time, or for defendants to show the contrary. She has accepted each year the contracts which were offered her by the County Board, although she and her legal counsel discussed the claim for a higher salary with various school officials on a number of occasions. But even if it should be held that she received a legal injury or a series of legal injuries during the years before 1940, which prevented her from receiving the salary to which she would otherwise have been entitled during all subsequent years up to 1957-58, such *injuries* occurred before 1940, although the alleged *damages*—lower salary, mental pain and suffering—continued over the years before and after 1940.

[*Time for Filing*]

The time for filing an action under the Federal Civil Rights Act is controlled by the applicable state statute of limitations. Wilson v. Hinman, 10 Cir., 172 F.2d 914, cert. den. 336 U.S. 965, reh. den. 337 U.S. 927, reh. den. 338 U.S. 953. I cannot reconcile the Maryland cases on the question whether the three year statute or the twelve year statute applies. The tangled reasoning on this subject by some of the late,

respected judges has produced a knot of such proportions that a modern Alexander is needed. See analysis of Maryland cases in Roland Electric Co. v. Black, 4 Cir., 163 F.2d 417.

But whether the three year statute or the twelve year statute applies, plaintiff's claim for back salary is barred. Any failure to rate plaintiff first class because of her race or color occurred before 1940 or 1941; she knew of her injury not later than 1939, when the Mills case was decided; she began to sustain the alleged damages—loss of salary, mental pain and suffering—before 1940. Her right of action for these injuries accrued before 1940. This court must follow the Maryland decisions; and there can be no question but that, under those decisions, the period of limitations runs from the time when the wrong is committed and the cause of action accrues. Hahn v. Claybrook, 130 Md. 179, 182; W. B. & A. Elec. R.R. Co. v. Moss, 130 Md. 198, 204-205; Callahan v. Clemens, 184 Md. 520, 527. See also Easter v. Dundalk, 199 Md. 324, 327, 328. In this respect, the Maryland law is in accord with the general law. Pickett v. Aglinsky, 4 Cir., 110 F.2d 628, 630.

Moreover, plaintiff's claim for back salary in this case is barred by her failure to comply with the requirements of Art. 57, sec. 18.[3]

For any error by the County Superintendent in rating plaintiff second class during the years 1940-48, plaintiff's remedy was by appeal to the State Board of Education. Art. 77, sec. 144; Robinson v. Board of Education of St. Mary's County, D.Md., 143 F.Supp. 481, and cases cited therein.

3. Plaintiff's claim for damages for mental pain and suffering and for punitive damages.

A *fortiori*, these claims are barred by Art. 57, secs. 1, 3 and 18.

4. Plaintiff's prayer for an injunction.

It appears that plaintiff will receive during the coming school year the highest salary which a teacher in Prince George's County without a degree can receive under the present salary schedule. There is no evidence of any present discrimination against Negro teachers in Prince George's County. Every Negro teacher is now rated first class by her principal. There is no need for any injunction.

The complaint is hereby dismissed, with costs.

3. "No action shall be maintained and no claim shall be allowed against any county or municipal corporation of Maryland, for unliquidated damages for any injury or damage to person or property unless, within ninety days after the injury or damage was sustained, written notice thereof setting forth the time, place and cause of the alleged damage, loss, injury or death shall be presented either in person or by registered mail by the claimant, his agent or attorney, or, in case of death, by his executor or administrator, to the City Solicitor of Baltimore City, the County Commissioners, or the corporate authorities of the municipal corporation, as the case may be. The provisions of this section shall only apply to Caroline, Montgomery and Prince George's Counties."

CONSTITUTIONAL LAW

State Sovereignty Commission; Records and Reports—Arkansas

Roland SMITH, et al. v. FAUBUS, et al.

Chancery Court Pulaski County, Arkansas, August 20, 1958, No. 108907.

SUMMARY: Ten Negro ministers in Arkansas brought a class action in federal court against the Governor of Arkansas as Chairman of the State Sovereignty Commission and the members of the Commission. The complainants [2 Race Rel. L. Rep. 1103 (1157)] asked for the convening of a three-judge district court and a declaration of unconstitutionality of Arkansas Acts 83, 84, 85 and 86 of 1957 [2 Race Rel. L. Rep. 491, 453, 495, and 456 (1957)], creating the Commission and defining its duties, relieving school children of compulsory school attendance at integrated schools, requiring certain persons to register with the Commission and to make periodic reports, and authorizing school districts to employ legal counsel to defend suits. The petition stated that the enforcement of these acts, when read together, would deprive the plaintiffs and the class they represent of the equal protection of the laws

in violation of the constitution. The defendants filed a motion to stay. The court, applying the doctrine of equitable abstention (see 2 Race Rel. L. Rep. p. 1215), ordered a stay pending construction of the statutes in question by courts of the state of Arkansas. 2 Race Rel. L. Rep. 1103. (E.D. Ark. 1957). A similar complaint was then filed in an Arkansas chancery court, but by stipulation the challenges to Acts 84 and 86 were stricken. Plaintiffs asked that Acts 83 and 85 be declared unconstitutional and that defendants be enjoined from enforcing them. Act 83 created the State Sovereignty Commission to "protect the sovereignty of the State of Arkansas, and her sister states from encroachment thereon by the Federal Government," and gave the Commission authority to provide advice and legal assistance to school districts upon matters "involving civil or criminal litigation or otherwise, relating to the commingling of the races in the public schools of the State." Act 85 requires the registration of persons and organizations promoting school desegregation by legislation or litigation, and further requires the keeping of records regarding contributions and expenditures and the making of periodic reports to the Sovereignty Commission. Denying injunctive relief and dismissing the complaint the court held that the two acts are not unconstitutional on their face and that it was not established that they had been or would be unconstitutionally administered.

WILLIAMS, Chancellor:

DECREE

This case came on for a trial before the Court on April 9, 1958, the plaintiffs appearing in person and by their attorneys, J. R. Booker, Little Rock, Arkansas, Thad D. Williams, Little Rock, Arkansas, Harold B. Anderson, Little Rock, Arkansas, U. Simpson Tate, Dallas, Texas and James M. Nabritt, Jr., Washington, D. C. and the defendants appearing by their attorney, R. B. McCulloch, Forrest City, Arkansas, and the Court having heard and considered the pleadings, the testimony and exhibits, and the arguments and briefs of counsel, finds:

1.

This is an action for a declaratory judgment to declare Acts 83 and 85 of the General Assembly of the State of Arkansas for the year 1957 unconstitutional and to enjoin the defendants from enforcing the said Acts. Acts 84 and 86 of 1957 were originally challenged in the complaint but were stricken by stipulation of the parties and are not now involved in this proceeding.

2.

The said Acts, on their face, are not unconstitutional and the proof did not establish that the administrative practice under the Acts has been or will be such as to justify a conclusion that the Acts, as applied to these plaintiffs and the class they represent, will necessarily result in a deprivation of constitutional rights. Based thereon,

IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

A.

That Acts 83 and 85 of the General Assembly of the State of Arkansas for the year 1957 are hereby declared to be valid and constitutional.

B.

That the prayer of plaintiffs for an injunction against the defendants be, and the same hereby is, denied and the complaint of the plaintiffs be, and the same hereby is, dismissed with prejudice.

C.

That the defendants have and recover from the plaintiffs their costs herein expended.

ENTERED this 20 day of August, 1958.

CORPORATIONS
NAACP—Georgia

NAACP, INC; et al. v. T. V. WILLIAMS, Revenue Commissioner

Court of Appeals of Georgia, June 23, 1958, 104 S.E.2d 923.

SUMMARY: The Georgia Revenue Commissioner made a demand on the National Association for the Advancement of Colored People and on certain of its officers and employees in Atlanta, Georgia, for the production of association records in order to determine whether it should be required to file state income tax returns. When the demand was refused, the commissioner obtained in a superior court an order for the production of the records. Upon a further refusal, the commissioner filed a petition for a contempt citation. The court found the Association and some of the individual respondents in contempt. By court order, time for producing the records was extended, one of the individual respondents was given a suspended sentence, and the Association was fined $25,000 with provision for remission of part of the fine upon a further showing. 2 Race Rel. L. Rep. 181 (1956). Superior Court Judge Durwood T. Pye refused to sign respondent Association's bill of exceptions necessary for appeal, and ordered certain statements deleted and another inserted. The respondents then petitioned the Georgia Court of Appeals for mandamus to compel the trial judge to certify the bill of exceptions in its original form. The petition was denied, the appellate court characterizing the statements ordered deleted as colloquies and observations between court and counsel and not evidence in the case, and the statements ordered inserted (that respondents would not unconditionally abide by the court's previous order) as declarations of counsel in open court imputable to the clients and, therefore, essential to a complete brief of the material evidence of the case. *NAACP v. Pye*, 101 S.E.2d 609, 3 Race Rel. L. Rep. 312 (Ga. App. 1957). The Association and the President of its Atlanta Branch then appealed by writ of error. The Georgia Court of Appeals noted that the bill of exceptions was identical to that before it in the *Pye* case, since none of the corrections ordered there had been made. The court held that the certificate of the trial judge that the bill was true and specified all the evidence and record material was contradicted by his other certificate only conditionally approving the brief of evidence. As a result of there not being an unqualified certificate of the bill of exceptions, the appellate court held that it lacked jurisdiction to review and, on motion, dismissed the writ.

FELTON, Chief Judge.

This is an appeal by the National Association for the Advancement of Colored People, and J. H. Calhoun, the President of the Atlanta Branch of said association, from an order and judgment adjudging defendants in contempt for the violation of an order of court requiring the production of records for inspection by the Revenue Commissioner of Georgia for income tax purposes.

1. The motion to dismiss the writ of error on the ground that the bill of exceptions was not tendered in time is without merit for the reason that the trial judge certified as true a recital in the bill of exceptions that the bill of exceptions was presented within thirty days from the date of the judgment complained of.

2. The motion to dismiss the writ of error on the ground that the brief of evidence was not unconditionally approved is without merit for the reason that such a fact is not a ground of dismissal of the writ of error.

3. The motion to dismiss the writ of error on the ground that the certificate to the bill of exceptions is conditional, is meritorious and is granted.

[*Identical Bill*]

The bill of exceptions in this case is the identical one which was before this court in the matter of the plaintiffs in error's petition for mandamus, National Association for the Advancement of Colored People et al. v. Pye, Judge, 96 Ga. App. 685 (S.E.), including the certificate in question. No effort was made to correct the brief of evidence as required and no new certificate was presented to or signed

by the judge unconditionally certifying that the bill of exceptions contained all the evidence and specified all of the record necessary to an understanding of the errors complained of. The judge's certificate, in full, is as follows:

"I do certify that the foregoing bill of exceptions is true and specifies all the evidence, and specifies all the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the Court of Appeals, that the errors alleged to have been committed may be considered and corrected.

"I do further certify that the facts relating to the presentation and certification of this bill of exceptions and the delays incident thereto are as set forth in the following orders of this Court, complete copies of which parts of the record in said case, certified as such, the Clerk of the Superior Court of Fulton County is hereby ordered and directed to transmit to the Court of Appeals with this bill of exceptions, to-wit: (a) Order of February 12, 1957 entered on copy of communication addressed to counsel for plaintiffs in error dated February 11, 1957, making said copy a part of the record, said copy and order filed February 12, 1957. Said order and copy of communication are both to be transmitted; (b) Order of February 26, 1957 entered on 'Request for Clarification,' and said 'Request for Clarification,' both filed February 26, 1957, and both to be transmitted; (c) Order of April 15, 1957 entered on copy of communication dated April 13, 1957 to counsel for plaintiffs in error, making said copy a part of the record, said copy and order both filed April 15, 1957, and both to be transmitted; And also in the following facts: Said communication of April 13, 1957 refers to documents handed the Court on March 18, 1957 and on March 21, 1957; these two dates refer to but one occasion the correct date of which was March 18, 1957; no documents of any kind were handed the Court on March 21, 1957; the first part of said communication had been prepared before receiving counsel's letter dated April 12, 1957, which is set out in the communication and erroneously states the date as March 21, 1957; in the latter part of the communication the Court made the same error. And also in the following facts: On May 13, 1957 counsel for plaintiffs in error left the message in the Court's office that they would bring documents that afternoon at four o'clock; shortly before that hour counsel called and stated there was delay but they would come at five o'clock; the Court instructed that counsel be advised the Court was leaving and would receive the documents the following morning, at which time, the morning of May 14, 1957, there were tendered the Court the following documents, to-wit: The transcript of the proceedings in two parts, which has been certified, and the brief of evidence (except documentary evidence), which has been conditionally certified. Also tendered was a statement of counsel as to why they declined to follow the Court's directions as to the brief of evidence in certain particulars. This statement has been made a part of the record by order dated the 5th day of June, 1957, and a copy of the same and of said order certified as such are ordered transmitted by said Clerk to the Court of Appeals.

"This 6th day of June, 1957.

"/s/ Durwood Pye
Judge, Superior Court,
Atlanta Judicial Circuit"

"ADDITION BY COURT

"By Item 7 of the record there is referred to the transcript of the proceedings in two parts—Part 1 and Part 2, with separate orders of the Court approving each part dated June 5th, 1957.

"By Item 8 of the record there is referred to the brief of the evidence (except documentary evidence) with the conditional approval of the Court thereon dated June 5th, 1957, and the separate documentary evidence, with the approval of the Court thereon dated June 5th, 1957.

"/s/ Durwood Pye
Judge, Superior Court, A.J.C."

[*Certificate of Evidence*]

The certificate to the brief of evidence is as follows:

> "I do certify that the foregoing 348 pages constitute a true and correct brief of the evidence (except documentary evidence which is herewith separately certified), except for the following, each of which was heretofore by communication dated April 13, 1957 made a part of the record by order of April 15, 1957, called to the attention of counsel for the respondents in said case, said counsel refusing to comply with the order of said date in respect thereto, to-wit: 1. The following should be deleted: On Page 4 beginning with the words, 'Mr. Moore: If the defendants had had time', etc., through end of Page 10. Also, on Page 57, delete from the words, 'The Court: Do you make any attack on the validity of the regulation?' through the words, 'it is a perfect defense.' These deletions are in conformity with the requirements of Items 1 and 2 on Page 2 of the aforesaid order. 2. The following should be inserted on Page 2 between the words, 'The Court: Well, suppose the Court accorded you a hearing now and went into the whole matter and concluded that you ought to produce these records. Would you produce them?' and the words, 'Mr. Moore: No. As to that, I take this position,' etc., to-wit: At this point A. T. Walden, leading counsel for respondents, stated to said Moore audibly in substance as follows: 'Tell him we will produce them if he will revoke his order,' following which said Moore answered the Court as follows: This is in compliance with the first part of Item 12 of Page 3 through the middle of Page 5 of the aforesaid order. 3. Delete the following: On Page 344 from the words, 'The Court: As a lawyer and officer of the Court,' etc., through the words on Page 345, 'the income and disbursements of the corporation.' This is in compliance with Item 16 of the aforesaid order.
>
> "This 5th day of June, 1957.
>
> "Durwood T. Pye
> Judge, Superior Court,
> A.J.C."

The first part of the judge's certificate that the bill of exceptions was true and specified all the evidence and record material is contradicted by the later statement that the brief of evidence specified was conditionally approved. Such a certificate is not an unqualified certificate that the bill of exceptions specifies all of the record and evidence required. Such a conclusion is implicit, at least, in our ruling on the petition for mandamus. We now expressly so rule. This conclusion is in perfect accord with the contentions of plaintiffs in error in their petition for mandamus. Paragraph five of the petition for mandamus alleged:

> "That on the 14th day of January, 1957, petitioners tendered their bill of exceptions to the Honorable Durwood T. Pye; that after numerous correspondence and communications between Court and counsel for petitioners herein, as well as hearings, for the purpose of perfecting the Bill of Exceptions, said judge, did on June 6, 1957, fail and refuse to sign a legal and valid certificate upon the Bill of Exceptions in that said certificate, as signed, is not unqualified; for the reason that the judge's certificate attached to the Bill of Exceptions notes that, '.....the brief of evidence.....has been conditionally certified'. Also, the Court in his certificate of June 5, 1957 on the stenographic transcript of the brief of evidence recites, in part, that, 'I do certify that the foregoing 348 pages constitute a true and correct brief of the evidence (except documentary evidence which is herewith separately certified), except for the following, each of which was heretofore by communication dated April 13, 1957, made a part of the record by order of April 15, 1957, called to the attention of counsel for respondents in said case, said counsel refusing to comply with the order of said date in respect thereto .....' A copy of said communication dated April 13, 1957 and made a part of the record by order of April 15, 1957, is attached as Exhibit 'B' and made a part hereof by reference. Also attached as Exhibit 'C' and incorporated herein by reference, is a copy of the respondents reply to said communication of April 13, 1957, said reply being dated May 14, 1957."

[*Duty of Judge*]

Paragraph ten of the petition for mandamus alleged: "Your petitioners are advised that it

was the official duty of said Judge to certify their Bill of Exceptions as tendered, without modifications, additions, and deletions therein set out by him; that he committed error in refusing to certify same as tendered and that his refusal to certify said tendered bill of exceptions without the modifications described in his certificate rendered his said certification thereof conditional, thus depriving this court of jurisdiction to review the judgment rendered in said case." The proper and necessary procedure in the matter would have been for plaintiffs in error to correct the brief of evidence by including therein the matter directed by the judge to be included and to delete the matter ordered deleted by the judge and to have the corrected brief approved by the judge unconditionally; and the bill of exceptions should have been corrected as directed by the judge and as corrected should have been presented to the judge whose duty it would have been to sign an unconditional and unqualified certificate to the effect that it specified all of the evidence and record necessary to a clear understanding of the errors complained of. Instead of following the above procedure the plaintiffs in error filed the same bill of exceptions, as aforesaid, which, being qualified as stated, under the plain and distinct decisions of the courts of this state amounted to no bill of exceptions at all. A bill of exceptions certified as this one is not certified as required by law and the reference in the purported certificate to insufficiencies of the facts alleged in the bill of exceptions is no more than notice to the party of such defects. Williams v. Smith, Judge, 93 Ga. App. 429 (2) (S.E.); Youmans, Sheriff, v. Consumers Finance Co., 80 Ga. App. 676 (S.E.); Jones v. Pierce, 66 Ga. App. 254 (S.E.), and citations.

Under the foregoing authorities the only recourse this court has is to dismiss the writ of error for the reasons above stated which show that this court is without jurisdiction of the case.

Writ of error dismissed. Quillian and Nichols, JJ., concur.

ON MOTION FOR A REHEARING

The certificate in this case did not attempt to make all corrections necessary in the brief of evidence by inserting them in the certificate or by reference to an approved part of the record, assuming even that such a thing could be done under decisions cited in the opinion, but indicated some deficiencies by mere reference to a conditionally approved brief of the evidence and the facts of this case do not bring it within the rule that this court can treat as surplusage the additional matter added by the trial judge to his purported certificate. Neither did the certificate require to be sent to this court approved parts of the record which were not specified in the bill of exceptions. These facts render inapplicable the rulings in Crumley v. Hall, 202 Ga. 588 (S.E.); Harris v. Lumpkin, 136 Ga. 47 (S.E.); Scott v. Whipple, 116 Ga. 211 (S.E.).

Moreover, in order for this court to consider the merits of plaintiffs' petition for mandamus, 96 Ga. App. 685, supra, this court necessarily was required to find, in accordance with plaintiffs' contentions, that the bill of exceptions was conditionally certified, for the reason that if the certificate had been unconditional the trial court was without jurisdiction to sign another certificate and the case would have been filable in this court on the unconditional certificate already signed. The plaintiffs have now reversed the position which they solemnly took in judicio, and under which they prevailed in obtaining a ruling on the merits of their petition for mandamus and they are now estopped to contend that the present certificate is unconditional. Bennett, Admx. v. Bennett, 210 Ga. 721 (S.E.) and cases cited; Ga. Code Ann. § 38-114, catchword "Position".

Motion for a rehearing denied.

ELECTIONS
Registration—Louisiana

James SHARP, Jr., v. Mrs. Mary LUCKY, Registrar of Voters, Ouachita Parish.

United States District Court, Western District, Louisiana, September 15, 1958, 165 F.Supp. 405.

SUMMARY: The plaintiff, a Negro attorney, brought an action for damages in federal district court against the defendant as registrar of voters of Ouachita Parish, Louisiana. The plaintiff claimed that he had been injured professionally by a refusal of the defendant to permit him to inspect in defendant's office a client's registration card for the stated reason that only white people were waited on there, whereas the cards of Negroes whose registrations were challenged were kept in another room where defendant's assistant waited on members of that race. An injunction also was sought to bar segregation practices in the office of defendant and her successors. The court granted a motion to dismiss for lack of jurisdiction on the basis that the right to practice law is wholly a state-controlled privilege not involving federal civil rights. The other allegations of the complaint were held not to state a valid cause of action. 148 F.Supp. 8, 2 Race Rel. L. Rep. 431 (W.D. La. 1957). The Court of Appeals for the Fifth Circuit, however, reversed and remanded the case on the ground that the Louisiana parish could not validly operate a segregated registrar of voters office. 252 F.2d 910, 3 Race Rel. L. Rep. 241 (1958). [See also *Reddix v. Lucky*, 148 F. Supp. 108, 2 Race Rel. L. Rep. 426 (W.D. La. 1957), *rev'd* 152 F.2d 930, 3 Race Rel. L. Rep. 229 (5th Cir. 1958.)] Upon return of the case to the District Court, plaintiff abandoned his claim for damages based on alleged professional injuries and prayed only for a declaratory judgment and an injunction against the defendant's segregation of the races in her office. After trial on the merits the court declined to grant the declaratory and injunctive relief and dismissed the suit. It found that the exceptional instances when separation of the races had occurred had been arranged in a good faith effort to provide service and that, even if a wrong had been done, the arrangement complained of had been voluntarily stopped before the suit was filed.

DAWKINS, J.

When this case was here before, plaintiff presented it purely and simply on the theory that his rights as a lawyer had been violated. He even claimed he had been damaged "in his profession" to the extent of $25,000, which he demanded from plaintiff, in addition to his prayer for declaratory and injunctive relief. This is shown, as clearly as plain English can do so, by the verbatim quotations from his complaint set forth in our original opinion, Sharp vs. Lucky, 148 F.Supp. 8, at page 9.

Finding, on the authority of two Supreme Court decisions and holdings by the Eighth and Ninth Circuits, that interference with, or discrimination against, the practice of law did not involve Federal civil rights, we dismissed the case for want of jurisdiction, 148 F.Supp. at page 12.

On appeal, plaintiff completely changed his position by asserting that he sought relief, not as an attorney, but as a negro. Notwithstanding its own prior rulings, and the great weight of authority everywhere, holding that such an about-face will not be permitted,[1] two members of a three-judge panel of the Fifth Circuit Court of Appeals reversed our ruling and not only

1. 3 American Jurisprudence, "Appeal and Error", § 253, p. 35:
"*Doctrine of Adherence to Theory Pursued Below.*—It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review. Under this rule, a party will not be permitted, in the appellate or reviewing court, to assume a position inconsistent with that occupied by him in the trial court with respect to the grounds or theory of recovery or relief or of defense or opposition, the nature or sufficiency of pleadings, the admissibility or sufficiency of evidence, or the burden of proof." (Citing 14 U.S. Supreme Court cases, and a plethora of others from practically all State courts.)
4 C. J. S., "Appeal and Error", § 228, pp. 665 *et seq.*:
"Generally, sometimes by virtue of express statutory provision, questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal; and a fortiori, where counsel declares on the trial in open court that only a certain question is involved in the case or where, by stipulation, the case is submitted only on a certain question, other questions cannot be raised in the appellate court."
§ 232, pp. 674 *et seq.*:
"Under the rule that questions not raised in the

allowed plaintiff to maintain his suit in his new capacity, but held that he could prosecute it as a class action in behalf of all other negroes similarly situated.[2] We are bound by that Court's mandate, which is the law of this case.

[*Seeks Declaratory Judgment*]

Thus vicariously recast, plaintiff's complaint is that defendant, the Registrar of Voters for Ouachita Parish, Louisiana, has been and still is guilty of violating his rights and those of other negroes, by segregating the white and negro races in her office. He seeks a declaratory judgment to the effect, and an injunction against any future official conduct intended to accomplish that result. Since the case was returned here for further action, he formally has abandoned and dismissed his claim for damages.

As soon as our Calendar permitted, after receipt of the appellate Court's mandate, we tried the case on its merits, hearing testimony from a number of witnesses. We have studied the record and briefs and now have arrived at our Findings of Fact, based upon the evidence we believe, and our Conclusions of Law, as follows:

Defendant has been the Registrar of Voters for Ouachita Parish, Louisiana, since January 1, 1953. Her assistant is Mrs. Mae Morin, who has served as such since 1955.

The Registrar's office is located on the second floor of the Ouachita Parish Court House, in Monroe, Louisiana. It is a room about 25 feet square. Immediately adjacent to it is the Police Jury Room, which is somewhat larger. These rooms are connected by a doorway, both also having separate doors entering into a central hallway.

Normally, the Police Jury Room is kept closed except when that public body meets officially, about once a month. The Registrar's office, however, is in daily use. Toward the front of this office, and crosswise of the room, about 10 feet from the hallway entrance, is a large chest-high counter which extends almost from one wall to another, at which persons having business with the Registrar are served. Behind the counter are two desks, chairs and record cases. There is no counter in the Police Jury Room, and it is furnished with tables, chairs and benches. Ordinarily, the door between the two rooms is kept closed.

In addition to these rooms, the District Court Room and a number of other offices are located on the second floor of the Court House.

[*List "Purged"*]

In early August, 1956, is keeping with her duty under the State law[3] and in preparation for the presidential election to be held in November of that year, defendant proceeded to "purge" the voter registration rolls in her office. This consisted of examining each registration card, and determining whether the registrant was, or had become, disqualified to vote.[4] In any case where a disqualification was noted, defendant sent a challenge to the person concerned, requiring that he present himself at the office within a stated delay to justify his continued registration, or to re-register.

On August 13, 1956, defendant sent out approximately 1500 challenges, of which about 1,000 went to white voters and 500 to negroes. All of the negroes whose registrations were challenged resided in Wards 3 and 10 of Ouachita Parish, located within the city limits of Monroe, there being a total of ten wards in the Parish.

Soon after the challenges were issued, voters of both races began pouring into defendant's office to answer them. Not only was the Registrar's office filled to capacity, the entire hallway on the second floor became congested with members of both races. Of their own volition, and not because of anything done by defendant or her deputy, most negroes stood back and allowed white persons to go ahead of them, with the result that the negroes were not being fairly and adequately served.

Because of this, defendant made arrangements with Police Jury officials to use its room to handle the overflow; and, since negroes had not been receiving service on a "first-come-first-served" basis, it was decided to place the registration cards of those negroes who had been challenged, from Wards 3 and 10, in the Police Jury Room. The substantially larger number of cards of all other negro registrants from those

lower court will not be considered on appeal, a party is prevented from obtaining on appeal relief which was not asked for in the court below, and as a rule plaintiff cannot set up for the first time on appeal a cause of action or ground of recovery not relied on or brought up in the lower court."

See also Indiviglio v. United States, 5 Cir. 1957, 249 F.2d 549, at 560, and authorities there cited.

2. Sharp v. Lucky, 5 Cir., 252 F.2d 910.

3. LSA-R.S. 18:131.

4. LSA-R.S. 18:132.

two wards, and from the eight other wards of of the Parish, were left in defendant's office.

[*Better Facilities*]

This method of operation gave the challenged negro registrants better physical facilities than the whites, because they could sit down at the chairs, tables and benches in the Police Jury Room, whereas the much larger number of white persons had to stand in the hallways and at the counter in defendant's office, it being possible to serve only a few at a time. Negroes also were handled much faster than the whites because of this.

So well did the system work, so advantageous was it to the negroes, that several negro leaders thanked defendant for having made it possible that a larger number of negroes could answer challenges in a more comfortable manner; while many other negroes showed their appreciation by bringing flowers and gifts of various kinds to defendant.

This system was continued until August 31, 1956, when the rush was over. Then all of the remaining challenged negro registration cards were returned to defendant's office, where they and all other cards, negro and white, have remained ever since. The only other occasion in the history of defendant's official service when negroes used the Police Jury Room, for dealing with the Registrar's office, was in the late fall and early winter of 1955. At that time, just prior to the state gubernatorial election held in January, 1956, large numbers of both races were crowding into defendant's office for the purpose of registering to vote. Because the negroes were not being fairly and adequately served, due not to any fault of defendant or her assistant but to their own deference to the white persons present, and in order better to accommodate them, defendant used the Police Jury Room in which to register them, thus affording them more comfortable facilities as well as being able to register a much greater number than otherwise would have been possible. For this consideration, defendant and her assistant also received thanks, and expressions of appreciation, from many of the negroes.

[*Facts Undisputed*]

All that we have just related stands undisputed in the evidence.

On August 25th, 1956, plaintiff accompanied his client, Willie Tillman, whose registration had been challenged, to defendant's office. There is a dispute in the testimony as to what then occurred. Plaintiff, Tillman, and a Mrs. Vera Hill (also a negro) testified that defendant told plaintiff she did not serve negroes in her office and that they would have to go to the Police Jury Room next door, where her assistant would wait on them. Defendant testified that all she told them was that Tillman's card was in the Police Jury Room, not her office, and that Mrs. Morin would wait on them there.

From our observation of the demeanor of these witnesses on the stand, and having noted the "pat" version of the incident as given by plaintiff, Tillman, and Mrs. Hill, we believe Mrs. Lucky's version, for she impressed us, above all else, as a completely honest person. Irrespective of that, however, the point really is of no great importance in view of the facts already related, and those[5] we now proceed to set forth.

The crucial, undisputed truth is that what was done so obviously was not intended as a discrimination—a designedly malicious segregation of negroes—but was for their advantage and convenience. Defendant, and her assistant, testified that they never, at any time, had any intention of discriminating against negroes, nor would they do so in the future. Quite to the contrary, they were trying to help them. Even in April and May of 1956, after thousands of registered voters of both races had been challenged by Citizens Council members,[6] and the Court House was literally swarming with people, negroes and whites were handled indiscriminately in defendant's office without segregation of any kind. Except as related, and for the reasons already given, on no occasion except during the latter part of August of 1956, have the cards of negroes and whites been separated or segregated. Even on the single date of which plaintiff complains, and to which his evidence exclusively relates, if a negro or white citizen had wanted to

5. Plaintiff and one other witness testified further that there was a sign marked "Colored" on a table between defendant's office and the Police Jury Room. In our judgment this is a pure fabrication which did not exist. Both defendant and Mrs. Morin denied this; and if it had been true, surely plaintiff could have produced many other witnesses to prove it.

6. Of the 29,966 registered voters in Ouachita Parish at that time, 4,441 white voters' registrations were challenged as were 5,782 negro registrations. See Sharp v. Lucky, 5 Cir., 252 F.2d 910, at p. 914, fn. 2.

transact business with defendant respecting the registration of any negro in Wards 1, 2, 4, 5, 6, 7, 8 or 9, or as to unchallenged negro registrations in Wards 3 and 10, they would have done so in defendant's office, not in the Police Jury Room. Moreover, in August of 1956, any new negro registrant likewise would have been handled in defendant's office. Since August 31st, 1956, all cards of both races have been kept in defendant's office without distinction, and it is her intention to keep them there in the future.

[*No Expectation of Repeat*]

In the light of these facts, if a wrong was done—and we are convinced there was no purposeful discrimination here against plaintiff or any of the class he represents—then the undisputed evidence shows that there is assuredly ". . . no reasonable expectation that the alleged wrong will be repeated",[7] the arrangement of which plaintiff complains having been of less than three weeks' duration and having been stopped voluntarily almost a month before this suit was filed. In such circumstances, should a Court of equity, exercising a fair and reasonable discretion, as we are bound to do, issue a harsh decree forbidding defendant to do something she long since has stopped? We are sure that we should not. A decent respect for the comity which prevails between state and federal authority practically compels this conclusion. 28 American Jurisprudence, "Injunctions", § 24, p. 217, states:

> "The extraordinary character of the injunctive remedy and the danger that its use in improper cases may result in serious loss or inconvenience to an innocent party require that the power to issue it should not be lightly indulged in, but should be exercised sparingly and cautiously, only after thoughtful deliberation, and with a full conviction on the part of the court of its urgent necessity. In other words, the relief should be awarded only in clear cases, reasonably free from doubt, and, when necessary, to prevent great and irreparable injury. The court should therefore be guided by the fact that the burden of proof rests upon the complainant to establish the material allegations entitling him to relief."

Especially should an injunction not be issued where there has been, as here, a voluntary discontinuance of an alleged illegal activity, accompanied by a *bona fide* intention to comply with the law and not to resume the "wrongful" acts.[8]

For these reasons, in the exercise of the discretion with which we are vested, we find that plaintiff is not entitled to the declaratory and injunctive relief which he demands. Accordingly, his suit will be dismissed.

A proper decree should be presented on notice.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, on this the 15th day of September, 1958.

7. From Derrington v. Plummer, 5 Cir., 240 F.2d 922, 925, cited and principally relied on by plaintiff.

8. Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419, 421, 65 S.Ct. 1242, 89 L.Ed. 1705:

> "While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' Walling v. Helmerich & Payne, 323 U.S. 37, 43, it may justify a court's refusual to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts."

See also to the same effect United States v. United States Steel Corp., 251 U.S. 417, 445; Tilbury v. Rogers, 123 F.Supp. 109, 114, aff. 5 Cir., *per curiam*, 220 F.2d 757; United States v. Standard Oil Co., 78 F.Supp. 850, aff. 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371; Champion Spark Plug Co. v. Reich, 121 F.2d 769, cert. den. 314 U.S. 669, 62 S.Ct. 130, 86 L.Ed. 535; Gray v. University of Tennessee, 342 U.S. 517, 72 S.Ct. 432, 96 L.Ed. 540; Brown v. Board of Trustees, 5 Cir., 187 F.2d 20.

EMPLOYMENT
Labor Unions—Federal Statutes

Sam H. CLARK, et al. v. NORFOLK AND WESTERN RAILWAY CO. and Brotherhood of Railroad Trainmen, et al.

United States District Court, Western District Virginia, May 5, 1958, Civil No. 689.

SUMMARY: Plaintiffs, Negro brakemen employed by the defendant railroad, brought an action in the federal district court alleging that the defendant Brotherhood and the defendant railroad had entered into certain agreements which discriminated against members of the Negro race. The agreements provided that Negro brakemen were non-promotable to the position of "car retarder operator." The court, on January 31, 1956, as amended on March 29, 1956, entered an order granting the plaintiff's prayer for an injunction restraining the enforcement of the agreements, but left the matter of damages open pending further evidence. On May 5, 1958, the court entered an order allowing $1800 compensatory and $1000 punitive damages to one plaintiff and nominal compensatory and $1000 punitive damages to each of the other two plaintiffs. Attorneys' fees were also assessed as a part of the costs imposed on the defendants. Reproduced below are the order of May 5, 1958 allowing damages, and the orders of January 31, 1956, and March 29, 1956, granting the injunction.

Opinion on Damages, May 5, 1958

PAUL, District Judge.

This action was originally brought by Sam H. Clark, Robert Coles and Robert A. Hamlar, employed by the defendant, Norfolk and Western Railway Company, as yard brakemen in its yards at Roanoke, Virginia. The complaint alleged that plaintiffs are Negroes who, because of their race, are excluded from membership in the Brotherhood of Railroad Trainmen. It further alleged that the Brotherhood, acting as collective bargaining agent for the craft or class of brakemen of which plaintiffs are members, had entered into certain agreements with the Railway Company, the effect of which was to deny to Negro brakemen the right to be promoted to the position of what is known as a "car retarder operator" and to permit white brakemen only to be promoted to such positions. It was further alleged that plaintiffs had on many occasions requested the Railway Company to give them the opportunity to qualify for car retarder operator positions, but that their requests had been refused while at the same time the Railway had filled such positions with white brakemen of less seniority and no more experience or competence than plaintiffs and other Negro brakemen.

Stated in brief summary, the prayer of the complaint was that the court declare the agreement between the Brotherhood and the Railway Company illegal and void in so far as it withheld from plaintiffs and other Negro yard brakemen the same opportunities to qualify for and occupy the position of car retarder operator as were afforded to white brakemen; that the Brotherhood of Railroad Trainmen be enjoined from purporting to act as representative of the class of brakemen so long as it refused to represent the Negro members of the class fairly and in good faith and without discrimination and refused to permit the Negro brakemen opportunity to participate in the collective bargaining on matters affecting their rights as members of the craft of brakemen. The complaint also prayed for compensatory damages against the Brotherhood and the Norfolk and Western and for punitive damages against the Brotherhood, and for the allowance of attorneys' fees and costs.

[*Earlier Findings*]

After a hearing on the merits of the complaint and the answers thereto, at which time considerable testimony was offered, the court, on January 31, 1956, entered its findings and conclusions and its order based thereon. Pursuant to a motion by the Norfolk and Western Railway Company an amended order was entered as of March 29, 1956. The findings and conclusions

of the court and the order are parts of the record and need not be further discussed here. It is sufficient to say that the order granted in substance the prayers of the complaint with the exception that the matter of damages to which the plaintiffs might be entitled, if any, was left open pending the offer of further evidence on that subject. This evidence has been submitted, briefs of counsel filed, and the matter of damages is now the sole matter before the court.

It has been the opinion of the court that the applicable statute of limitations on the claim for damages is five years and it is now so held.

[*Damage Question Difficult*]

The question of the fair amount of damages to be recovered in this case, if any, presents difficulties because of several facts. The action was instituted not only on behalf of the named plaintiffs, but as a class action on behalf of all other Negro yard brakemen similarly situated and employed by the Norfolk and Western. The order of the court enjoining the illegal discrimination against Negro brakemen applied, of course, to all of the class. However, when it came to the question now before the court, i. e., the matter of damages, testimony was introduced only as to the named plaintiffs.

There is no question of the fact that beginning at least in the year 1942 the named plaintiffs and other Negro brakemen, in communications addressed to both officials of the Railway Company and to officers of the Brotherhood, protested against the discrimination which made them "non promotable" to the position of car retarder operator and that they made requests to be given the opportunity to qualify for such positions. These protests and requests were repeated from time to time through the years and were consistently ignored by both the railroad and the union until this suit was instituted in March, 1954. Following the institution of the suit the Railway Company and the Brotherhood, in September, 1954, amended the contract between them so as to make Negro brakemen promotable to the position of car retarder operator, thus eliminating, at least in the contract, the discrimination against Negroes with respect to this position. This action, taken after suit was begun, was evidently based on the belief that the discriminatory provisions of the contract were legally indefensible in the light of various decisions of the courts.

Following the action which made Negro brakemen eligible to the position of car retarder operator all of the named plaintiffs made application for opportunity to qualify for these positions. Plaintiff Clark made application in December, 1954, and again in March and in April of 1955; Coles applied in November, 1954, and twice in April, 1955; Hamlar applied in December, 1954, and in March and in April of 1955. However, it appears that the first favorable action on any of these applications was in November, 1955, and on the application of Coles.

It appears that the procedure followed in regard to an application to qualify for the position of car retarder operator was to give the applicant a permit to go into one of the towers in which the car retarding mechanism was being operated and to observe the operation and receive instruction from the operator on duty. After several such experiences in the control tower applicants were given an examination, the nature of which is not shown. If they passed this examination they were placed on the list of qualified operators. The list of qualified operators included more persons than were regularly employed in this work and the men recently qualified were ordinarily called on only in an emergency or as substitutes for the regular operators. As time went by and vacancies occurred in the group of regular operators these vacancies were offered to men on the qualified list according to their seniority.

[*Retarder's Wage Higher*]

The hourly wage of a car retarder operator is higher than that of yard brakemen and it is suggested that the compensatory damages to the plaintiffs are to be measured by the difference between what they earned as brakemen during the five years (the period of limitation) preceding the institution of this action and what they would have earned as car retarder operators during that period. But in any attempt to apply this rule we are faced with the fact that none of them ever qualified as retarder operators and the questions arise, first, as to whether they could have done so; and, secondly, even if they had gotten on the qualified list there is the uncertainty as to when they would have attained the status of regular operators.

As previously stated, permission for these plaintiffs to attempt to qualify as car retarder operators was first granted in November, 1955. The plaintiff Clark had been retired for age

on April 30, 1955, and therefore never had an opportunity to qualify as a retarder operator. As to plaintiff Coles it is testified that he went into the control towers for instruction on two occasions, once in November, 1955, and again in February, 1956; and that when he was given an examination in April, 1956, he failed to qualify. When he later asked for another opportunity to qualify his request was refused. As to plaintiff Hamlar it is testified that he was granted permission to go into the towers for instruction at the same time such permits were given Coles, namely in November, 1955, and February, 1956; that he went into the towers on several occasions, but did not appear for the examination given in April, 1956. All of the times referred to are subsequent to the institution of this action.

Before taking up the matter of any specific amount of damages to be awarded any of the plaintiffs, there are certain contentions of the defendants to be considered. It is first urged that there has been no proof of actual loss to the plaintiffs and the compensatory damages cannot be based on speculation and conjecture, and that if the court should award any damages it should be only in a nominal amount.

It is true that compensatory damages cannot rest solely on speculation. But where it is evident that some loss has occurred it is not necessary that the exact amount thereof be proven. Where there is evidence from which the amount of damage can be ascertained or inferred within reasonable limits of accuracy it is the duty of the trier of facts, in exercise of his best judgment, to assess the amount of damage. This is a task which every jury faces in a tort action.

[*Question of Punitive Damages*]

A second contention of defendant Brotherhood is that, in the absence of statute, punitive damages cannot be awarded in an equitable proceeding. In support of this proposition counsel cite the case of Coca-Cola Company v. Dixie-Cola Laboratories, 155 F.2d 59, decided by the Court of Appeals of this Circuit. The case in question, as will be seen by reference to the opinion of the District Court, was one in which the only relief sought was the equitable remedy of injunction. See 31 F.Supp. 835, 837, where the court says:

> "(t)he plaintiff seeks relief of two kinds: First, an *injunction* against the use by defendants of the word 'Cola'***; and second, an *injunction* against the sale by defendants of any of their products *** unless" etc. (Emphasis supplied)

The error into which counsel in the instant case have fallen is in overlooking the fact that the instant case is one in which the plaintiffs have joined both equitable and legal claims—as they had a right to do under the Rules of Civil Procedure. See Rule 2. "There shall be one form of action to be known as 'civil action'." It is true that the Federal courts still recognize the distinction between legal and equitable remedies. But they allow both to be sought in one action. See Rule 18 (a) stating:

> "The plaintiff in his complaint **** may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.

In the instant case the equitable claim of the plaintiffs was disposed of by the injunction order entered in January, 1956, as amended on March 30, 1956. At that time the legal claim (for damages) was, in accordance with customary practice, reserved for trial at a later date. Since it was a legal claim, as distinguished from one in equity, the court summoned and had present a jury on the date set for trial (February 11, 1957); and, as shown by the record of the proceedings, it was only because both parties waived a jury trial and expressed their desire to submit all matters to the court that the trial was not had before a jury.

[*Proof Element Considered*]

As previously noted, the defendants earnestly contend that no proof has been submitted on which compensatory damages can be based and that at most the plaintiffs are entitled only to nominal damages. Out of this they evoke the contention that punitive damages can be awarded only where there is a finding of compensatory damages. Among other authorities cited in support of this proposition is the case of Durham v. New Amsterdam, etc. (C.C.A. 4) 208 F.2d 342, which in turn cites Zedd v. Jenkins, 194 Va. 704, to the following effect (p. 706);

> "The general rule is that a plaintiff cannot maintain an action to recover mere punitive or exemplary damages, and that a finding

of compensatory damages is a prerequisite to an award of exemplary damages." (Citing cases)

While not definitely so stating the defendants appear to concede that since the right of the plaintiffs not to be discriminated against has been vindicated they are entitled to nominal damages for the previous denial of their rights. But whether this concession is made or not the court is of opinion that plaintiffs have established their right to, at least, nominal damages. See 15 Am. Jur. p. 390.

> "Nominal damages are those recoverable where a legal right is to be vindicated against an invasion that has produced no actual present loss or where, from the nature of the case, some injury has been done the amount of which the proofs fail to show. The law infers some damage from the breach of an agreement or *the invasion of a right;* and if no evidence is given of any particular amount of loss, it declares the right by awarding what it terms "nominal damages." (Emphasis supplied)

The court does not take issue with the principle stated in Zedd v. Jenkins, supra. Where the defendants fall in error is assuming that the term "compensatory damages" can only mean damages in a substantial amount clearly proven and that only if such damages are awarded can there be a further award of punitive damages—that the term "compensatory" necessarily excludes nominal damages. However, reference to the opinion in the Zedd case discloses that the court was dealing with a verdict which stated:

> "We, the Jury, find for the plaintiff in the amount of $3000.00 as punitive damages only."

The appellate court, speaking through Hudgins, C. J., said that the fault in this verdict was that, "It was illegal in that it contained an assessment of punitive damages without finding that plaintiff was entitled to any compensatory, *or even nominal,* damages." (Emphasis supplied). The inference would seem to be that an award of even nominal damages would support one for punitive damages also.

[*Other Authority*]

However, there is in Virginia more direct authority on the subject. In the case of Wright v. Cofield, 146 Va. 637, the appellate court upheld a jury verdict which recited that we "find for the plaintiff, as damages, the sum of one dollar, and as punitive damages the additional sum of nine hundred and ninety-nine dollars."

In this case the defendant had attacked the verdict as being excessive but did not mention, nor did the court discuss, any such contention as is advanced by the defendants here.

It is a recognized principle that the law infers damage from the invasion of a legal right; and where the plaintiff is unable to show any actual detriment or where the amount of damage is incapable of ascertainment the plaintiff is entitled in any event to nominal damages. And while there are some holdings to the contrary I am convinced that the strong weight of authority is to the effect that under such circumstances an award of exemplary damages is permissible; provided, of course, that there are present the considerations upon which punitive damages are traditionally based. See lengthly note citing cases in 33 A.L.R. p. 403. I am further of opinion that the law in Virginia is not to the contrary.

There is no question that the legal rights of the plaintiffs have been violated by the discrimination against them in the contract between the defendants and by the failure of the Brotherhood to represent them fairly as bargaining agent. Steele v. L. & N. R. Co., 323 U.S. 192, 207; Tunstall v. Brotherhood etc., 323 U.S. 210; Rolax v. Atl. Coast Line, 186. F.2d 473. This violation of their rights in itself calls for the award of damages, even though in the absence of proof of pecuniary loss, the award be limited to a nominal amount. I am of opinion further that the case is one which calls for the award of punitive damages. The cases of Steele v. L. & N. R. Co. and Tunstall v. Brotherhood, supra, dealt with contracts between labor unions and railway companies involving the same discrimination against Negro employees exhibited in the instant case. These cases were decided by the Supreme Court in December, 1944. The Rolax case was decided in 1951. Other cases resting on the same principle have been decided following those cited: e. g. Railway Mail Association v. Corsi, 326 U.S. 88; Graham v. Brotherhood, etc., 338 U.S. 232.

There is no question that the defendants have been fully acquainted with the effect of the decisions cited. Yet over a period of ten or twelve years they persistently and flagrantly disregarded them and deliberately persisted in

their discrimination against the Negro employees. They paid no attention to the protests which the plaintiffs and other Negroes made as to the discrimination practiced against them and it was only after this action was brought that the discriminatory contract was amended. The elements which call for exemplary damages are clearly present here.

[*Individual Plaintiffs' Cases*]

We now come to consider the cases of the individual plaintiffs. As stated before the plaintiff Clark was never afforded an opportunity to qualify as a car retarder operator due to his retirement shortly after the discrimination against Negroes was ended. This plaintiff testified as a witness and impressed the court as an alert and very intelligent person. He had been in the service of the railroad since 1913. He had been a yard brakeman for many years and was thoroughly familiar with the Roanoke yard. I have no doubt that had he been allowed the opportunity to qualify as a card retarder operator when he first requested it he could have qualified and that due to his seniority he would in due course have become one of the regular operators. I am not too strongly impressed with the argument that the position of car retarder operator is one of great difficulty requiring exceptional aptitude. It appears that since institution of this action Negroes have been employed as retarder operators in the yard of the defendant railroad in Bluefield, West Virginia, and at Lambert's Point, Norfolk, Virginia. Admittedly the Roanoke yards are larger and the operations there more complicated than at the other places mentioned, but the operation is essentially the same and the difference is one of care and experience. Dozens of white brakemen have qualified as retarder operators at Roanoke and there is nothing to indicate that they were more intelligent and experienced than Clark.

Based on these conclusions, I think that Clark is entitled to compensatory damages based on the difference in the wages he received as a brakeman during the five years preceding institution of this action and the wages he would have received as a car retarder operator. This sum is not possible of determination with complete accuracy because of reasons some of which have been mentioned, but it is reasonable to assume that Clark would have been one of the regular operators during all or most of the five year period. A fair estimate of his damage in this respect is $1,800.00.

The situation as to Coles and Hamlar is somewhat different. It appears that Coles was given an opportunity to qualify for the position of retarder operator, although it hardly appears to have been a fair opportunity, in that he was refused a further chance after failing on his first test. The evidence as to Hamlar is as hereinbefore set out. He did not appear as a witness in the case and the court had no opportunity to judge of his intelligence or aptitude. As to neither of these plaintiffs is the evidence such as to permit the court to say that it is convinced (as it was as to Clark) that he could have qualified as a retarder operator with a fair opportunity to do so. In the absence of such evidence the court cannot assume either that they could or could not have qualified and, therefore, is not justified in awarding compensatory damages based on any differential in wages.

[*Entitled to Nominal Damages*]

However, this does not mean that these plaintiffs are not entitled to nominal damages. Nor does it mean that all of the plaintiffs, including Clark, are not entitled to punitive damages. On the contrary, I am of opinion, for the reasons heretofore stated, that they are.

> "Exemplary damages are those given, not as a pecuniary compensation for the loss actually sustained by the plaintiff, but as a warning to the defendant and to others, to prevent a repetition or commission of similar wrongs." Weatherford v. Birchett, 158 Va. 741, 747.

In their complaint the plaintiffs prayed for compensatory damages against both the Brotherhood and the Norfolk and Western, but limit their prayer for punitive damages to the Brotherhood. The defendants urge that there can be no recovery of punitive damages against only one of two joint wrong-doers and that, therefore, damages of this nature cannot be awarded against the Brotherhood. To support this proposition they cite certain language from 15 Am. Jur. 736 and in 25 C. J. S. 732, in both of which it is said that this rule prevails "in some jurisdictions."

However this is clearly not a general rule. In an annotation in 62 A.L.R., following the reported case of Thomson v. Catalina (Cal.) it is said at p. 240:

"The holding in the reported case that the jury, in an action against tort-feasors, may make awards for exemplary damages in different amounts, depending upon what the evidence shows and the jury finds to be the differing degree of culpability among the several defendants, seems to be in accord with the majority of the cases which have passed on this point."

Cases are cited to support this view, which to this writer, at least, seems the proper one. If it appears in an action against two wrongdoers that one of them offended through ignorance or mere carelessness while the action of the other was purposeful and malicious there seems no sensible reason why a jury should not be allowed to assess punitive damages against the latter alone. The case of Davis v. Franke, 33 Gratt. 413 Va. does not support the defendants' contentions.

[*Railway's Liability*]

In view of the Railway Company's apparent willing agreement to the discriminatory contract in the face of the repeated court decisions denouncing similar ones, there is question as to whether it also might have been subjected to punitive damages. But the complaint does not seek this relief, and the court is not free to consider it.

The court finds that the plaintiff Sam H. Clark is entitled to recover the sum of $1,800.00 as compensatory damages to be assessed against the Brotherhood and the Norfolk and Western jointly; and that Clark is entitled to the further sum of $1,000.00 as punitive damages against the Brotherhood. That the plaintiffs Coles and Hamlar are each entitled to recover the sum of $1.00 compensatory damages against the Brotherhood and the Railway jointly and that each are entitled to recover the sum of $1,000.00 punitive damages against the Brotherhood.

The plaintiffs in their complaint pray also for a reasonable fee for their attorneys and for costs. There is no question that the plaintiffs are entitled to have the customary costs adjudged against the defendants, and I believe this is a proper case for the allowance of attorneys' fees as part of the costs. This has been an extended litigation in all aspects of which counsel for plaintiffs have represented their clients ably and in a manner which reflects that they have worked industriously in their behalf. The efforts of counsel would justify their charging a fee out of proportion to their clients' apparent ability to pay. This court does not attempt to fix a total fee as between the plaintiffs and their counsel, but since this litigation was made necessary by the obdurate refusal of the defendants to recognize the rights of the plaintiffs, the court does feel justified in allowing plaintiffs to recover, at least in part, the cost which they have been put to in vindicating those rights. Authority for this action is found in the case of Rolax v. Atlantic Coast Line, et al. (C.C.A. 4) 186 F.2d 473, 481, where, in a similar situation, in language strikingly appropriate to the instant case, the court says:

"Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expenses in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter rested in the sound discretion of the trial judge."

Allowance of $750.00 as part of the costs to be applied on plaintiffs' counsel fees will be made.

Findings of Fact, January 31, 1956

PAUL, District Judge.

This cause came on to be heard on the thirtieth day of January, 1956, upon the complaint and answers filed herein and the Court,

having heard the testimony and the arguments of counsel, and being fully advised in the premises, makes the following

FINDINGS OF FACT

1. Plaintiffs are Negro yardmen employed by the Norfolk and Western Railway Company as yard brakemen, and are members of the craft or class of yardmen employed by said railroad company. The seniority of the named plaintiffs is as follows: Sam H. Clark, from June 10, 1913; Robert Coles, from December 3, 1917; Robert A. Hamlar, from June 7, 1920.

2. This is a class action brought by plaintiffs in their individual capacities and as representatives of all the Negro yardmen employed by the Norfolk and Western Railway Company.

3. The Norfolk and Western Railway Company is a corporation engaged in interstate commerce.

4. The Brotherhood of Railroad Trainmen is a national labor union and is the collective bargaining representative under the Railway Labor Act of the craft or class of yardmen employed by the Norfolk and Western Railway.

5. By custom and practice, all Negro yardmen employed by said railway company are known as "nonpromotable" yardmen; white yardmen are known as "promotable" yardmen.

6. That during December 1941 the Norfolk and Western Railway established car retarders in its terminal at Roanoke, Virginia.

7. On December 30, 1941, an agreement was entered into between the Norfolk and Western Railway Company and the Brotherhood of Railroad Trainmen extending the seniority of "promotable" yardmen at Roanoke to include positions of car retarder operators. On March 15, 1952, an agreement was entered into between the Norfolk and Western and the Brotherhood of Railroad Trainmen extending the seniority of "promotable" yardmen at Norfolk, Virginia, to include positions of car retarder operators. On April 7, 1954, subsequent to the filing of this suit, an agreement was made effective between the Norfolk and Western and the Brotherhood of Railroad Trainmen extending the seniority of "promotable" yardmen at Bluefield, West Virginia, to cover positions of car retarder operators. The effect of these agreements was to exclude Negro yardmen from qualifying for, and being assigned to, the position of car retarder operator.

8. Negro yardmen employed by the Norfolk and Western Railway Company are excluded from membership in the Brotherhood of Railroad Trainmen.

9. The Brotherhood of Railroad Trainmen gave the Negro members of the craft or class no notice or opportunity to be heard concerning the making of any of the agreements hereinbefore referred to.

10. As a result of said agreements, plaintiffs and the other members of their class have been denied the opportunity to qualify for, and be assigned to, positions as car retarder operators.

11. On September 8, 1954, after this suit was filed, the Brotherhood of Railroad Trainmen and the Norfolk and Western Railway Company amended the collective bargaining agreement in effect between the parties to remove therefrom the word "promotable" as it applied to the craft or class of yardmen. On November 21, 1955, the Norfolk and Western Railway Company issued permits to members of the craft or class of yardmen, including the Negro members of the craft, authorizing them to attempt to qualify for positions of car retarder operator. Although some Negro yardmen have been given some instructions in the operation of the car retarders, the evidence shows that they have not been given the opportunity to actually operate any of said retarders. No Negro yardmen have been qualified for, or assigned to, positions of car retarder operator.

12. Although the term "promotable" was removed from said collective bargaining agreement under date of September 8, 1954, the Brotherhood of Railroad Trainmen still excludes Negroes from membership therein and there has been no change in its policy with respect to giving to the Negroes who are excluded notice and opportunity to be heard concerning any matters covering the collective bargaining agreement.

13. The agreements of December 30, 1941, March 15, 1952, and April 7, 1954, were unfair and discriminatory against the plaintiffs and their class.

14. That the evidence adduced at the trial hereof convinces the Court that plaintiffs and

their class are still being discriminated against and there is likelihood of continued discrimination against them.

15. The Court therefore makes the following:

CONCLUSIONS OF LAW

1. The Brotherhood of Railroad Trainmen, as the collective bargaining representative under the Railway Labor Act of the craft or class of yardmen employed by the Norfolk and Western Railway Company owes a statutory fiduciary duty to all members of the craft or class of yardmen to represent them fairly and impartially and without hostile discrimination, and is required by the Railway Labor Act to refrain from using its statutory position to discriminate against plaintiffs and their class.

2. That in the making and the enforcement of the agreements referred to in the findings of fact and in the course of its representation of the craft or class of yardmen on the Norfolk and Western Railway, the Brotherhood of Railroad Trainmen has unlawfully discriminated against plaintiffs and the members of their class because of their race.

3. That the Norfolk and Western Railway Company is precluded by the Railway Labor Act from enforcing or taking the benefits of the unlawful agreements entered into with said Brotherhood.

4. That the Brotherhood of Railroad Trainmen is under a continuing duty to represent plaintiffs and their class fairly and impartially and said plaintiffs and their class are entitled to injunctive relief to secure said fair representation in the future.

Amendment of March 31, 1956

The Norfolk and Western Railway Company having heretofore, on February 8, 1956, filed its motion that the order of injunction entered in this case on the 31st day of January, 1956, be amended by deleting therefrom paragraph 1 of said order and substituting certain other language therefor, all of which is particularly set out in said motion.

And said motion having come on to be heard on March 27, 1956, and having been fully argued by counsel for the plaintiffs and for the defendants and the court being of opinion that said motion is well taken and that said order should be amended to clarify the intentions of the court in the entry of the original order and to make more certain the rights of the parties hereto.

Now, therefore, it is ORDERED that the paragraph numbered 1 of said order of January 31, 1956, is hereby amended to read as follows:

> 1. That the defendant, Brotherhood of Railroad Trainmen, its officers, agents, employees, local and general chairmen, acting in the capacity of collective bargaining agent under the Railway Labor Act and all persons in active concert or participation with it or them, acting in such capacity including Norfolk and Western Railway Company, its officers, agents, and employees are hereby permanently restrained and enjoined from denying to plaintiffs and the other Negro members of the craft or class of yardmen employed by Norfolk and Western Railway Company the right and opportunity to qualify for positions of car retarder operators upon the same terms and conditions as are afforded white members of said craft or class, and, upon qualifying, to be assigned to positions as car retarder operators upon the same terms and conditions as are afforded white members of said craft or class.

It is further ORDERED that the remaining portions of said order of January 31, 1956, remain as set out in said order.

EMPLOYMENT
Labor Unions—Federal Statutes

HUNTER v. ATCHISON, TOPEKA & SANTA FE RY.

United States District Court, Northern District, Illinois, August 8, 1958.

SUMMARY: Certain train porters employed by the Santa Fe Railway filed a class action in federal court in Illinois in 1944 against the railroad, its brakemen employees and an official of the National Railroad Adjustment Board to enjoin the enforcement of an award of the latter agency. The award had been rendered in 1942 after a hearing, notice of which had been given to the Santa Fe and the Brotherhood of Railroad Trainmen (representing the brakemen) but not to plaintiffs nor to the Brotherhood of Sleeping Car Porters which on occasion (but not in this instance) negotiates collective bargaining agreements for train porters. By the award certain disputed work which the carrier had assigned to train porters was allotted to brakemen. On October 31, 1944, a temporary restraining order was entered by the court enjoining the displacement of train porters on the basis of the award. The restraint was continued until the entry of the final decree in 1958, in which the court by mandatory injunction ordered the redetermination of the basic dispute by the Board after giving proper notice and opportunity to be heard to the Sleeping Car Porters as well as to the Trainmen and the carrier.

MINER, District Judge:

This cause coming on for final hearing, the Court having heard all the evidence submitted and being fully advised in the premises;

FINDINGS OF FACT

The Court finds as follows:

1. That this is a class action brought by plaintiffs on behalf on themselves and other members of their class or craft, known as train porters, and alleged by plaintiffs to include train porters, also known as porter-brakemen, and chair car attendants employed by defendant The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines (hereinafter called "Santa Fe"); that this is a true class action in that the character of the right sought to be enforced for the class is joint, or common, and the persons constituting the class are so numerous as to make it impracticable to bring them all before the Court; that the named plaintiffs are representative of the entire class or craft, have no interests adverse to those of any member of the class or craft, and adequately represent each and every member thereof for the purposes of this litigation.

2. That the defendants include Santa Fe, the members and secretary of the National Railroad Adjustment Board, First Division, and certain individuals employed by Santa Fe as brakemen, said brakemen being named as representatives of the class or craft of Santa Fe employees known as brakemen.

3. That employees as train porters and employees as brakemen constitute separate classes or crafts of employees, the train porters being represented for collective bargaining purposes by the Brotherhood of Sleeping Car Porters and the brakemen being represented by the Brotherhood of Railroad Trainmen.

4. That train porters do not work under a collective bargaining agreement; they are and have been, since the first employment of the craft about 1900, hired as employees at will of the Santa Fe under individual oral contracts of employment.

5. That the brakemen employees of the Santa Fe work under a collective bargaining agreement negotiated on their behalf by the Brotherhood of Railroad Trainmen, known as the "Trainmen's Agreement", which agreement, although amended at various times thereafter, has been in effect continuously since about 1892.

6. That the disputed work involved herein consists of the performance by train porters of braking duties on the head end of certain Santa Fe passenger trains, on which such work had been theretofore performed by brakemen or on which the brakemen claimed the right to perform such work; and that no part of said work was or is performed by chair car attendants.

7. That the performance of said braking work

by train porters on the head end of Santa Fe passenger trains, in addition to their other duties such as keeping coaches and chair cars under their care clean, has been the subject of protest by brakemen for many years, said brakemen claiming that the Trainmen's Agreement gives them the exclusive right to perform all braking duties.

8. That on May 3, 1939 the Brotherhood of Railroad Trainmen, on behalf of brakemen, submitted certain wage claims against the Santa Fe to the National Railroad Adjustment Board, First Division, based on use of train porters to perform the disputed work; formal notice of said submission was given to the Santa Fe, but not to the train porters; and evidence herein submitted is insufficient to establish that the train porters, as a class, had actual knowledge of said proceeding before the Adjustment Board during the pendency thereof.

9. That said submission to the Adjustment Board involved an interpretation of the Trainmen's Agreement as applied to the disputed work, the brakemen contending that the use of train porters or other employees not holding seniority as brakemen was in violation of the Trainmen's Agreement and the Santa Fe contending that the Trainmen's Agreement did not cover the disputed work and that the carrier was free to assign said work to train porters under the decisions of prior Boards and established custom and usage.

10. That hearings were had by the Adjustment Board during June, 1941, of which formal notice was given by the Board only to the Santa Fe and the Brotherhood of Railroad Trainmen, and on April 20, 1942 the Adjustment Board rendered its award, No. 6640, sustaining the position of the brakemen, allowing their wage claims and holding that the use of train porters or other employees to perform the disputed work was in violation of the Trainmen's Agreement.

11. That by agreement between the Brotherhood of Railroad Trainmen and the Santa Fe dated April 27, 1944, the wage claims involved in said Adjustment Board proceeding were paid, and said agreement provided for the assignment of brakemen to the disputed work, displacing train porters in the performance thereof. Said agreement was entered into for the purpose of giving effect to the aforesaid Award No. 6640 and as a result of said Award.

12. That this suit was filed on August 21, 1944, seeking to enjoin enforcement of said award insofar as it required displacement of train porters in the performance of the disputed work, and for wages lost by train porters thus displaced. On October 31, 1944, a temporary restraining order was entered enjoining displacement of train porters solely under the provisions of said award from positions then held by them and which they had held prior to the entry of said award, and the defendants have been similarly restrained at all times since October 31, 1944, by injunction orders, the order presently in effect being a preliminary injunction order dated February 6, 1948, reinstated pursuant to order entered January 9, 1952.

13. That all parties have had due notice of the final hearing herein and of the proposed entry of this decree.

CONCLUSIONS OF LAW

1. That this is an action wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States, particularly the 5th Amendment of the Constitution, and the Railway Labor Act (45 USC Sec. 151 et seq.), and this Court has jurisdiction of the subject matter and of the parties.

2. That the train porters and chair car attendants presently employed by the Santa Fe who were employed and were working as train porters on or before April 20, 1942 were and are entitled to notice of all hearings in said Adjustment Board proceeding which resulted in Award 6640, and they were and are entitled to participate in said hearings, and all other individuals presently working as train porters are entitled to notice of and the opportunity to participate in the reopened proceeding herein ordered.

3. That the rights of the employees described in the preceding paragraph to notice and the opportunity to participate in said Adjustment Board proceedings can and will be fully protected if said Board is directed to reopen said proceedings and rehear and redecide said submission after due notice to them through their representative, the Brotherhood of Sleeping Car Porters, and permitting them or their said representative to submit evidence and to be heard in said proceeding.

4. That inasmuch as Award 6640 rendered

April 20, 1942 was entered in a proceeding of which the train porters had no legally sufficient notice, train porters should not be prevented from performing braking duties on the head end of Santa Fe passenger trains solely by reason of award 6640 rendered April 20, 1942.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the members and Executive Secretary of the First Division of the National Railroad Adjustment Board, individually and as such members and Executive Secretary, be and they are hereby enjoined and directed to reopen forthwith the files of the First Division of the National Railroad Adjustment Board in its Docket No. 7400, issue forthwith proper notice under the Railway Labor Act to the train porters involved in said dispute in Docket No. 7400 through their representative, Brotherhood of Sleeping Car Porters, permit said Brotherhood of Sleeping Car Porters to make a submission and be heard in said docket, give notice to and permit the Brotherhood of Railroad Trainmen to make a further submission and be heard in said docket, give notice to and permit the Atchison, Topeka and Santa Fe Railway Company to make a further submission and be heard in said docket, and redecide said docket No. 7400.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that until said docket No. 7400 has been redecided by said Adjustment Board, the Atchison, Topeka and Santa Fe Railway Company, its officers and agents, and Santa Fe employees as brakemen and their agents and representatives, be and they are hereby enjoined and restrained from taking any action to displace train porters in the performance of head end braking duties on Santa Fe passage trains solely under provisions of National Railroad Adjustment Board, First Division, Award No. 6640, rendered April 20, 1942.

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary injunction order dated February 6, 1948, as reinstated by order entered January 9, 1952, be and the same is hereby vacated, and the deposit of $1,000 made by plaintiffs to secure the same be and the same is hereby ordered returned to the plaintiffs or their attorney.

4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other relief sought by plaintiffs or any other party herein, be and the same is hereby denied.

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no costs be awarded to any party herein.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the jurisdiction of this court be retained during the pendency of said reopened Adjustment Board proceedings, but solely for the purpose of carrying out the injunctive provisions of this decree.

EMPLOYMENT
Labor Unions—Federal Statutes

John SYRES and Louis WARRICK v. OIL WORKERS INTERNATIONAL UNION, Local 23, et al.

United States Court of Appeals, Fifth Circuit, July 18, 1958, 257 F.2d 479.

SUMMARY: Members of a labor union, composed solely of Negroes, sued an "all-white" union to enjoin as discriminatory the enforcement of certain collective bargaining provisions in a 1954 contract, and for a declaratory judgment that such provisions are void. The white union had negotiated the contract, both for itself and for the members of the Negro union, which established two lines of seniority based on race. The Court of Appeals, Fifth Circuit, held that the Federal District Court did not have jurisdiction over the subject matter, for lack of diversity of citizenship between the litigants, there being, in that Court's opinion, no statute to construe, but rather a private contract. 223 F.2d 739, 1 Race Rel. L. Rep. 192 (5th Cir. 1955). The United States Supreme Court reversed the Court of Appeals and remanded for

further proceedings, citing cases that established federal jurisdiction over such questions because of the status accorded labor organizations under federal statutes. 350 U.S. 892, 1 Race Rel. L. Rep. 20 (1955). On remand, prior to trial the district court dismissed the action as moot, except for the claim for monetary damages asserted. Plaintiffs requested, but the court refused to give, instructions to the jury that the measure of monetary damages was the difference between the average wages in two specific divisions multiplied by the number of hours per individual that the 1954 contract was in force, then by the number of men who would have filled vacancies in the higher paid division but for discriminatory aspects of that contract. Instead, the jury was charged that, if their verdict was for the plaintiffs, damages should be determined on the basis of the actual pecuniary loss suffered by individual plaintiffs. From an adverse verdict and judgment, plaintiffs appealed, alleging erroneous instructions to the jury. The Court of Appeals, Fifth Circuit, affirmed. Noting that there was no proof that plaintiffs or any other particular individual had suffered damages from the alleged discriminatory provisions of the contract, the Court found no basis upon which plaintiffs could recover vicariously for damages allegedly suffered by their class on a theory of averages.

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

RIVES, Circuit Judge.

Local 254 of the Oil Workers International Union[1] and John Syres and Louis J. Warrick, individually and as representing a class similarly situated, filed this action in May 1954 against Oil Workers International Union, Local 23,[2] certain of its officers, as individuals and as representing members of a class, and the Gulf Oil Corporation. The complaint alleged that the collective bargaining agreement of April 17, 1954, with Gulf as employer, divided the jobs between the races and discriminated against Negroes. The complaint further charged that all of the defendants had conspired to deprive plaintiffs and other Negroes represented by them of their rights guaranteed under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. and under the Constitution of the United States. The district court at first dismissed the action for lack of jurisdiction, and this Court affirmed, the present writer dissenting. Syres v. Oil Workers International Union, Local No. 23, 5 Cir., 1955, 223 F.2d 739. The Supreme Court, in a brief per curiam, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, granted certiorari, reversed the judgment of this Court, and remanded the case to the district court for further proceedings, citing: Steele v. Louisville & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283.

1. Now Local 4-254, Oil, Chemical and Atomic Workers International Union.
2. Now Local 4-23, Oil, Chemical and Atomic Workers International Union.

[*New Contract*]

The collective bargaining agreement of April 17, 1954, claimed to be discriminatory was of eighteen months' duration. On March 14, 1956, a new labor contract covering the same employees was executed. This case was not reached for trial until October 1, 1956, about six months after the execution of the 1956 contract. The plaintiffs did not attack that contract as discriminatory or otherwise illegal, and, indeed, made no reference to it, but went to trial upon their original complaint. The defendant Gulf Oil Corporation moved to dismiss the action because it had become moot, and the district court sustained that motion "to the extent that all causes of action and claims for relief contained in Plaintiffs' said complaint save and except those relating to Plaintiffs' claim for monetary damages be and the same are hereby dismissed." The appellants do not complain of that ruling.

As a suit for damages, the case was tried before a jury. At the conclusion of the evidence, Local 254 withdrew as a party plaintiff. The district court submitted the case to the jury on behalf of the two individual plaintiffs and the class which they represent. The jury returned its verdict in favor of the defendants, on which judgment was entered. From that judgment the plaintiffs Syres and Warrick appeal, specifying as errors certain rulings upon the evidence and in the court's instructions to the jury, among others that the court erred "in its manner of instructing the jury in the question of damages."

Each of the defendants had moved for a directed verdict on the ground that there was no

competent evidence of damage suffered by any plaintiff or by any member of the class, and that the evidence was insufficient to warrant the submission of any damages on behalf of any person. On such motions, the district court reserved its decision under Rule 50(b), Federal Rules of Civil Procedure, 28 U.S.C. During the absence of the jury, however, the district court clearly indicated to counsel its opinion that the defendants were entitled to a directed verdict because no damages had been proved.[3]

[*Prayer for Damages*]

In addition to relief by way of injunction, now moot, the complaint had contained a general prayer for damages: "Plaintiffs further pray that this Court award them judgment for damages in the amount of one hundred fifty thousand dollars ($150,000.00)."

The theory upon which the plaintiffs undertook to establish their claim for damages is thus described in one of their requested but refused instructions:

> "The amount, of money, if any, to which the plaintiffs, Syres, Warrick, and those whom the named plaintiffs represent are entitled to is the difference between the average wage in the Operating Mechanical Division and that of the Labor Division, said average being the total of all salary items in either division, divided by the number of salary items in either division, times forty (40) (hour work week), times the number of weeks the contract of April 17, 1954, was in force, multiplied by the number of men that would have received such vacancies but for the contract of April 17, 1954."

Testifying in support of that theory, Syres calculated the recoverable damages to be $1,000,580.80.[4] On cross-examination Syres expressed his hope that, in some manner not provided in the judgment sought, any recovery might be distributed through the local union.[5]

3. "The Court: The Court has indicated in conference with counsel for all parties since the close of the evidence in this case, the Court is of the fixed opinion that your objections to the Charge on damages insofar as it points out that there is no evidence in this record to which the jury could calculate the damages is well taken.
"Mr. Keith: Well, I understand.
"The Court: And that is why the Court has thought all along you were entitled to an instructed verdict in this case, but since the Court is going to submit the case to the Jury, I will overrule your objection and the objections of the remaining Defendants and the objections from the Plaintiffs. Mr. Marshall, tell the jury to go to the jury room and start its deliberations."

4. "Q. And could you determine—and this is on the question of how you have estimated the damages that you have asked for in this suit, how have you estimated the damages with regard to the vacancies that have occurred? A. Well, I worked it out according to the division and I take a figure that any operating mechanical division that the total salaries divided by the hours run into $94.92. And, divide it by the number of salary items that we have accumulated within the provision would be $41.00 which would give an average of $2.32, an average in the operating mechanical division per hour.
"Q. Now, let me stop you there, you say that the average wage per hour in the operating mechanical division is what? A. $2.32.
"Q. $2.32? A. And in the labor division, the average would be a $1.56. Average hourly wages.
"Q. All right. Now, that would give you a difference of what as between the average salary of the two? A. That would give me a difference of $.76.
"Q. Difference of $.76? A. And I figured also that the number of hours worked per week at $.76 per hour will give me $30.40 a week.
"Q. What does that represent, the $30.40? A. Well, that gives me a difference in the rate between the operating mechanical division and the labor division provided my men had accepted this position and gotten a promotion.
* * * * *
"Q. Go ahead? A. On the average of thirty dollars and forty cents per week, that is, for the two year period which is one hundred and four weeks, I figured it was $3,161.60.
"Q. Now, is that the figure per man? A. That is the figure per man.
"Q. Would that be a figure or at least would that be the total figure each man would have lost in operating mechanical division by not having been able to avail themselves of the opportunity of having worked? A. That is correct.
"Q. And how many men have you said wished to avail themselves of that opportunity? A. Well, I am thinking that the amount of seniority that my men would have had if the five hundred of them would have been eligible for these promotions if they had had an opportunity and I multiplied five hundred times the $3,161.60 and I found the figure of one million, five hundred and eighty dollars and eighty cents, that is the total.
"Q. That is—that would be sufficient damages in this case which—A. (Interrupting) That is correct.
"Q. Which each man would have suffered? A. That is correct.
"Q. As an individual or total? A. That is right.
"The Court: That is just about ten times as much as you sued for.
"Mr. King:
"Q. Can you give some explanation why the difference between the amount that you originally calculated, could you say? A. You mean in the suit?
"Q. Yes. A. Well, first of all, we had no idea that it would run for this period of time, you see. We was thinking that it will be over in two or three months and we felt like we were justified in asking for a hundred and fifty thousand dollars."

5. "Q. Well, now, who is going to get this money, John? A. Well, the local union if we get any.
"Q. You mean this million five hundred eighty thousand eight hundred dollars [sic] or you mean

The district court charged the jury that in the event of a verdict for the plaintiffs the damages should be determined on the basis of the actual pecuniary loss suffered by the individual plaintiffs or by those whom they represent.[6] To that charge, the plaintiffs objected on the ground "that the proof was to be according to each individual man rather than as computed on an average basis."

[*Did Not Bid for Job*]

Syres admitted that he did not bid for any job in the Operating-Mechanical Division, and that he had no knowledge of Warrick having done so. Warrick did not testify. There was a total absence of proof that any particular individual had suffered any damage by reason of the alleged discriminatory provisions of the 1954 contract.

Wages are, of course, separately and individually earned. Promotions and failures to promote are peculiar to the individual employee. There was no claim nor evidence that any of such individually-owned rights had been transferred either to the local union or to the plaintiffs. No law has been cited, and we have been unable to find any which would permit the plaintiffs to maintain this action for damages vicariously or to recover on some theory of averages. When, if the proper parties were before it, the court could award equal and exact justice, why should it be required to render some rough or approximate judgment, rusticum judicium?

[*Analogy to School Cases*]

It is not enough to say that the right not to be discriminated against on account of race is joint or common and that a class action is maintainable under Rule 23(a), Federal Rules of Civil Procedure. Granted arguendo, it nonetheless remains true that in such an action the class can obtain only that relief to which it is entitled.

---

the $150,000? Who is going to get either or both? A. Well, the local union will get it.

"Q. And you are what in that local union? A. I am Secretary-Treasurer.

"Q. Well, who handles the money? A. I handle the money.

"Q. You handle the money? A. That is right.

"Q. Well, now, you are not going to give it to the members, if you get all of that money, you are not going to give it to the members? A. Well, that is going to be up to the members. If they want it, why, certainly.

"Q. But you are going to collect it yourself? A. If there is any I would like to collect it."

* * * * *

"Q. But you are going to collect it and still you say that you are going to collect it for the benefit of the union or for the benefit of your members? A. Well, the members of the union, the funds are all allocated. That is how it is distributed.

"Q. And if those, now, those members are individuals, aren't they? A. Yes.

"Q. And if any money comes in there it comes in for their benefit? A. Yes."

6. "Now, in the event your verdict is to be for the Plaintiffs, you should then consider the amount of damages, if any which the Plaintiffs are entitled to recover herein. If your verdict is for the Defendants you need not consider the question of damage or the cause any further. If you find and believe from a preponderance of the evidence that the Plaintiffs, John Syres, Louis J. Warrick, and those whom they represent or either of them sustained actual pecuniary loss proximately caused by the wrongful acts of the Defendants, if you find the Defendants guilty of such wrongful act, you should find and declare the sum of money, if any you find from a preponderance of the evidence that would fairly and reasonably compensate them or either of them and each of them by such loss, if any, they have suffered.

"Now, in considering this matter, you should consider the following items and none other; first, the existence of vacancies to which the Plaintiffs or any of them and those whom they represent were refused promotion solely because of race. Two; the existence of vacancies to which the Plaintiffs or any of those whom they represent would have been entitled to but for the contract of April 17, 1954; and, the actual amount of money that the Plaintiffs or any of them whom they represent lost by reason of being deprived of those jobs solely because of their race.

"Now, to illustrate what the Court has last stated, I give you this example not meaning to convey to the jury that the Court believes from the evidence in this case any such situation exists, but solely for the purpose of illustration. Suppose one John Jones, we will say, a negro member of 254 and an employee of the Gulf Oil Corporation refinery in question desired to bid on a job in the operational mechanical department and a vacancy in the operational and mechanical department occurred and John Jones, did, in fact, bid on that job and but for his race and the April, 1954, contract, he would have gotten that job. Then, to determine the amount of damages that John Jones sustained by reason of not getting that job on account of his race, you would determine from the evidence the difference between the wage he was being paid in the labor division and the wage he would have been paid in the operational mechanical division had he been given the job for the remainder of the term of the April, 1954, contract existing from the date he would have gotten that job and the expiration date of that contract. That would be the amount of damages that John Jones would be entitled to recover under such circumstances. And, of course, a similar statement with reference to the other negro employees of Gulf Oil Corporation in the same position, of course, would apply.

"And your verdict if to be for the Plaintiffs and you do find the Plaintiffs or those whom they represent have suffered damages will be for the Plaintiffs in the aggregate amount of the damages you find that the Plaintiffs or those whom they represent have sustained."

For example, here, the enforcement of the alleged discriminatory contract might have been enjoined if it had not expired and been replaced by one to which there was no objection. All that would be settled in such a class action is that Negroes as a class may not be excluded from jobs or promotion lists, may not be discriminated against because of their race or color. The necessary qualifications to hold any job or to merit any promotion are personal. A familiar analogy is supplied in school segregation cases, where, color aside, each individual must have the necessary qualifications to enter any particular school or college, and that is a matter which cannot be decided in the absence of the individual as a party.

> "* * * The representatives of the University seem to be apprehensive that a judgment in favor of all Negroes in North Carolina who may apply for admission to the University may deprive the Board of Trustees of their power to pass upon the qualifications of the applicants. Such is not the case. The action in this instance is within the provisions of Rule 23(a) of the Federal Rules of Civil Procedure because the attitude of the University affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools. But we decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications. This applies to the plaintiffs in the pending case as well as to all Negroes who subsequently apply for admission."
>
> Frasier v. Board of Trustees, D.C.M.D.N.C. 1955, 134 F.Supp. 589, 593, affirmed 350 U.S. 979, 76 S.Ct. 467, 160 L.Ed. 848.

Damages may sometimes be recovered in a class action, but where the damages, if recovered, would be in different amounts to separate individuals, the persons entitled thereto must be made parties or intervenors before the damages can be awarded.[7]

The appellants properly emphasize in brief "that the plaintiffs are only desirous that they be considered in their promotional qualification with the racial tag removed. Nothing more." It would seem to follow that any recovery of damages for discriminatory denial of advancement should be not for Negroes as a class, but on behalf of the individual employee.

None of the excluded evidence would have supplied the insufficiency in the proof of damages. On that issue the defendants would have been entitled, in the event of an adverse verdict, to judgment non obstante veredicto. Other claimed errors are, therefore, immaterial. The judgment is

Affirmed.

7. Alabama Independent Service Station Ass'n v. Shell Petroleum Corporation, D.C.N.D.Ala.1939, 28 F.Supp. 386, 390; Weeks v. Bareco Oil Co., 7 Cir., 1941, 125 F.2d 84, 91; Farmers Co-op. Co. v. Socony-Vacuum Oil Co., 8 Cir., 1942, 133 F.2d 101, 105; Citizens Banking Co. v. Monticello State Bank, 8 Cir., 1944, 143 F.2d 261, 264; Oppenheimer v. F. J. Young & Co., 2 Cir., 1944, 144 F.2d 387, 390; Kainz v. Anheuser-Busch, Inc., 7 Cir., 1952, 194 F.2d 737, 740, et seq.; Hughes v. Encyclopaedia Britannica, 7 Cir., 1952, 199 F.2d 295, 300; Hurd v. Illinois Bell Telephone Co., 7 Cir., 1956, 234 F.2d 942, 944.

FAMILY RELATIONS
Marriage—California

Patricia GAINES, Petitioner, v. John A. DAVIS, as County Probation Officer, County of Contra Costa, State of California, Respondent.

Superior Court of Contra Costa, California, February 10, March 6, 1958, No. R 5299.

SUMMARY: A petition was filed in California state court by an applicant for the position of County Field Probation Officer, requesting the court to order petitioner's appointment by the County Probation Officer. Petitioner alleged that she had headed the list of eligibles certified for the office after passing a civil service examination, but respondent probation officer had refused to appoint her. It was further alleged that the refusal was based in part at least upon

the "problem" anticipated from the fact that petitioner, a Caucasion, was married to a Negro man. Finding the allegations to be fact, the court concluded that the county appointing official had abused his discretion and ordered him to appoint petitioner to the position she sought. With reference to the "problem" feared by respondent, the court thought that such could be caused only by persons holding racial prejudices and said that such prejudices "must be stigmatized as un-American, and the problems thereby, however unpleasant, must not be allowed to override" constitutional rights. The court's Memorandum of Decision and its Findings of Fact and Conclusions of Law are reprinted below.

DONOVAN, Superior Judge:

MEMORANDUM OF DECISION

The Court has heard the testimony of the witnesses called in behalf of the Petitioner: Eric Emery, Director of Personnel of the Contra Costa County Civil Service Commission, John A. Davis (under C.C.P. 2055), Lawrence Speiser, Esq., an attorney for the Petitioner, and the Petitioner, Patricia A. Gaines; of the witnesses called by the Court: Robert Hamlin, Deputy Probation Officer, and Everett Harvey Joseph, Deputy Probation Officer; it has since the trial read the transcript of the testimonies of all the witnesses; it has read the briefs submitted herein, and it has done considerable research of the law at its own instance. The opinion reached herein has not been a hurried one; it is the result of many hours, many days of careful consideration and testing of the evidence, and of study of the adjudicated cases. Every effort was made to find a justifiable explanation for the action of the Respondent complained of herein. The Court did so because the Respondent and the efficient and conscientious discharge of his duties were well known to it over a period of many years as a judge of the Superior Court and of the Juvenile Court of Contra Costa County. Reluctantly the Court found that the overwhelming weight of the evidence indicated an abuse of discretion on the part of the Respondent in this instance, and that, under the law, the Court has no alternative but to decide adversely to the Respondent's position in this matter, and to grant the Writ of Mandate.

BASIS OF DECISION

From the testimony of the witnesses (*vide* testimony of Respondent, R. Tr. 189:25–191:9; R. Tr. 104: 2-6; testimony of Mr. Joseph, R. Tr. 131:21; R. Tr. 303:19–304: 1-4, and 20-25; testimony of Mr. Speiser, R. Tr. 62: 1-6; testimony of Petitioner, R. Tr. 237: 5-24), it appears that the only reason why the Respondent did not appoint any of the first three (3) certified by the Civil Service Commission, at the time the Petitioner headed the list in qualifications, was that the Petitioner, although qualified professionally, was married to a Negro, and that her appointment might be a problem to the Respondent; that at this time, between January and June, 1957, the only reason for the Respondent not appointing the Petitioner was that she was married to a Negro. The Respondent testified that later others were certified and he selected from the new list those whom he regarded as being more qualified from the standpoint of educational background and of personality; that at the later date, after being advised by the District Attorney that the refusal to appoint could not be based on the interracial marriage of one certified, he, in making the said appointments, was moved to do so solely because of what he considered superior educational qualifications and personality.

At the time of these appointments, however, the Petitioner had already been discriminated against, denied appointment solely because of the "problem to the Respondent" that might arise.

The "problem" could only be that caused by persons holding racial prejudices.

Problems frequently arise in connection with the recognition and enforcement of constitutional rights. Only recently the President of the United States was confronted with a problem of the most serious kind, a crisis in our government, in enforcing a constitutional right, but he did not yield to those entertaining racial prejudices.

The prejudices giving rise to these problems must be stigmatized as un-American, and the problems induced thereby, however unpleasant, must not be allowed to override rights accorded under the Constitutions of the United States and of the State of California. We cannot, as good citizens, give mere lip service in our professed dedication and allegiance to constitutional principles; the latter must be implemented by appropriate action.

Can it be validly contended that an interracial marriage does not come within the constitutional prohibition against discrimination because of race, creed or color; that such differentiation in marital status applies to both Caucasian and non-Caucasian, and, therefore, not discriminatory?

[*Equal Protection Clause*]

In Perez v. Sharp, 32 Cal. 2d 711 (1948), the court said: "The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to the Negro race, the Caucasian race, or any other race, but to the rights of individuals. . . . Since the essence of the right to marry is freedom to join with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry. . . . By restricting the individual's right to marry on the basis of race alone, they violate the equal protection of the laws clause of the United States Constitution. ". . . they violate the equal protection of the laws clause of the Constitution of the United States by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."

The Court in arriving at its determination has relied upon the following authorities: Terry v. Civil Service Commission of the City and County of San Francisco (1952), 108 C.A. 2d 861, 870, 871, 872; Hawthorn v. City of Beverly Hills (1952) 111 C.A. 2d 723, 731; Banks v. Housing Authority (1953) 120 C.A. 2d 1, 18, 23; McAlpine v. Baumgartner (1937) 10 C. 2d 409; Phelps-Dodge Corp. v. NLRB, 313 U.S. 177; Shaw v. San Francisco, 13 C.A. 547, 549.

To permit such action to go uncorrected should be of grave concern to believers in the democratic system. To deny the right to the Petitioner of the office to which she was certified by the body authorized by law, namely, the Civil Service Commission, because of action of the person who is given the discretion to select, in electing not to appoint merely because of her marital status, would be countenancing an improper exercise of discretion. It would be an approbation of an expressed distrust of the entire democratic process as embodied in our federal Constitution.

As a result of the foregoing considerations, and especially in reliance upon the authority that is contained within the adjudicated cases, it is ordered that the Respondent, within thirty (30) days from the date hereof, appoint the Petitioner to the office of deputy probation officer, to which she was certified and was qualified.

Let a peremptory writ of mandate issue accordingly.

Counsel for the Petitioner are directed to prepare Findings of Fact and Conclusions of Law in conformity with this memorandum of decision and submit to this court for signature within five (5) days from the date hereof.
February 10, 1958

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above proceeding in mandate coming on regularly for noticed hearing in Department 2 of the herein court before the Honorable Hugh H. Donovan, judge presiding, on September 16 and 17, 1957; the court sitting without a jury, Francis W. Collins, District Attorney of Contra Costa County, by David J. Levy, Deputy District Attorney of Contra Costa County, appearing for the respondent, John A. Davis, County Probation Officer; and Robert Condon, Esq., Fay Stender, Esq., and Albert M. Bendich, Esq., Staff Counsel for the American Civil Liberties Union of Northern California, appearing for the petitioner Gaines; and

On the aforesaid dates, namely September 16 and 17, 1957, oral and documentary evidence being received by the court in reported proceedings and said reported testimony becoming a part of the record within the herein cause; and

The matter being submitted to the court for decision on September 17, 1957; and

The court on its own motion vacating the aforesaid submission for the purpose of taking the testimony of Mr. Joseph and Mr. Hamlin; and

Said testimony being received in evidence by the court in reported proceedings and said reported testimony becoming a part of the record within the herein cause; and

The matter being re-submitted on October 7 for decision; and

Thereafter an opening brief and a closing brief being served and tendered to the court in behalf of petitioner; and a reply brief by the respondent being served and tendered to the court; and thereafter the cause standing submitted to the court for decision; and the court being fully advised in the premises; and the court having caused to be filed on February 10, 1958, its Memorandum of Decision in favor of the petitioner and disclosing that petition for writ of

mandate herein is granted to the petitioner; that thereafter respondent filed objection to Findings of Fact and Conclusions of Law and that on March 3, 1958, it was agreed by the petitioner and the respondent that the Findings of Fact and Conclusions of Law heretofore submitted by petitioner should be amended as set forth in respondent's objection to Findings of Fact and Conclusions of Law, the court now makes its Findings of Fact as follows:

FINDINGS OF FACT

I

That it is true that respondent John A. Davis was and is at all times pertinent herein the duly appointed, qualified and acting County Probation Officer, County of Contra Costa, State of California; that the said respondent County Probation Officer was and is at all times pertinent herein an "appointing authority" as defined in Article 1, Subsection D of the Rules and Regulations of the Civil Service Commission of the County of Contra Costa; that said respondent Probation Officer was and is at all times pertinent herein duly qualified and charged with the duty of appointing Field Probation Officers in the County of Contra Costa to fill the vacancies for such positions when they occur.

II

That it is true that the position of Field Probation Officer in said County is subject to the rules pertaining to examination, certification, and appointment of the Rules and Regulations of the Civil Service Commission of Contra Costa County as promulgated by the said Commission pursuant to Ordinance No. 325 of said County; that the position of Field Probation Officer is properly designated as public employment; that said Rules and Regulations are prescribed for the administration of a comprehensive merit system as provided for in said Ordinance No. 325 of said County.

III

That it is true that at least for the period from October 1956 to June 14, 1957, a vacancy existed for said Field Probation Officer position in Contra Costa County; that in the month of October 1956 examinations for said position were announced by the Civil Service Commission of said County.

IV

That it is true that the petitioner, Patricia Gaines, applied to take said examination; that on or about the 19th day of October 1956 petitioner was notified by the Civil Service Commission of said County that her application to take said examination for said position had been received.

V

That it is true that at the prescribed times and places in the months of November and December 1956 petitioner took the written and oral parts of said examination.

VI

That it is true that on or about the 12th day of December 1956, the Civil Service Commission of said County notified petitioner that she had passed said examination, and that her rank on the eligible list made up from said examination was No. 2 Promotional.

VII

That it is true that on or about the 27th day of December 1956, petitioner was informed by the Director of Personnel of said Commission that an adjustment had been made in the aforesaid eligible list for said position and that her status on said list had been changed from No. 2 Promotional to No. 5 Open.

VIII

That it is true that on or before the 10th day of January 1957, the said Director of Personnel duly informed petitioner that she was certified for the position of Field Probation Officer in said County with two others for positions in the cities of Richmond and Martinez; that petitioner was called for an interview following said certification, that she was interviewed by Deputy Probation Officer Robert Hamlin and Deputy Probation Officer Everett Harvey Joseph, who had been requested by the respondent appointing authority to conduct said interview and the said respondent appointing authority having delegated the power to the said Messrs. Hamlin and Joseph to conduct said interview; that they had received a good impression of her and that she was qualified for the position in question; that for the period between January and June 1957, when petitioner was on the certified list for said

position, she headed said list in qualifications; that one of the reasons why the respondent, John A. Davis, did not appoint the petitioner to said position was because he had been advised that petitioner, being a Caucasian woman and being married to a Negro man, might present a problem to the respondent.

IX

That it is true that respondent John A. Davis at all times pertinent herein was under the obligation and duty to make an appointment to fill said vacancy pursuant to the Rules and Regulations of said Civil Service Commission; that said respondent at all times pertinent herein was under the obligation and duty to fill said position by the appointment of one of the three persons certified to said position pursuant to said Rules and Regulations; that it is true that during the aforesaid period of time from January to June 1957, the said respondent had indicated that of the persons certified and available for said position he preferred not to appoint those persons other than the petitioner for reasons related to their professional qualifications for the said position, but that his reason for refusing to appoint petitioner to the said position was not related to her professional qualifications for the said position but considered, along with other matters, petitioner's marriage to a Negro; that petitioner was qualified and available within the meaning of the said rules and regulations of said Commission to accept said position.

X

That from the period from January to June 1957, the respondent willfully and consistently refused to appoint petitioner to the position of Deputy Field Probation Officer; that one of his reasons for not appointing petitioner was that he considered petitioner's marriage to a Negro as one of the factors relative to her appointment.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the court finds:

I

That John A. Davis, County Probation Officer of the County of Contra Costa, had the duty and obligation to appoint the best qualified person to fill the position of Deputy Field Probation Officer without considering in any way her marriage to a person of another race; that respondent's consideration of petitioner's marriage, however slight, so that it affected petitioner's appointment was an abuse of discretion by respondent.

II

That judgment is herein directed to be entered in favor of petitioner, Patricia Gaines, and adverse to respondent, John A. Davis, sued in his capacity as County Probation Officer of the County of Contra Costa; that the petition for peremptory writ of mandate is granted, ordering the said respondent to correct his abuse of discretion by not appointing petitioner during the period of January to June 1957, and respondent shall take all necessary steps to appoint the petitioner to the office of Deputy Field Probation Officer to which she was certified and for which she is qualified, as prayed by petitioner, within thirty days from and after February 10, 1958; that the petitioner is entitled to her proper costs of suit incurred herein.

Done in open court this third day of March, 1958 and presented for signature this 6 day of March, 1958.

GOVERNMENTAL FACILITIES
Private Hospitals—North Carolina

Hubert A. EATON, Daniel C. Roane, and Samuel James Gray v. BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL; Alan A. Marshall, Chairman; H. E. Hamilton, Secretary; the City of Wilmington, North Carolina, Dan D. Cameron, Mayor; and the County of New Hanover, North Carolina, Ralph T. Norton, Chairman of County Commissioners.

United States District Court, Eastern District, North Carolina, June 24, 1958, 164 F.Supp. 191.

SUMMARY: Three Negro doctors instituted a class suit in a North Carolina federal court against officials of a hospital in the City of Wilmington and against the city and the county, seeking to be admitted to practice medicine in the hospital as members of the "courtesy staff." For purposes of their motion to dismiss the defendants conceded that such privileges were denied to plaintiffs solely because of their race, but contended that, since the hospital was private, the denial was not "state action" contrary to the Fourteenth Amendment. The court found that, half of the land on which the hospital stands had been conveyed by the city and county in 1901 to the hospital board in order that a new hospital might be built thereon from privately-donated funds, to hold "so long as the same shall be used and maintained as a hospital for the benefit of the city and county." The only present interest of the city and county being a right of reverter, the court held that such did not give them control over the hospital. "This court knows of no authority which holds that the bona fide conveyance to a private corporation of public lands in turn makes a private corporation an agency of the state or creates the status of a public corporation." The court also noted that the state private act of 1901 chartering the hospital provided that its purpose was "to remove the management of the hospital as far as possible from the vicissitudes which generally result when such an institution is left in control of local municipal authorities." The court found no present trace of public control in the self-perpetuating board of the hospital although some of the original members had been named by city and county officials. Past contributions to operating expenses by the city and county did not establish present public connection. The fact that some four per cent of current income was being received from the county under a contract to care for indigent residents was held not to make the hospital public, it being in complete control of the expenditure of those funds. The complaint was dismissed for lack of federal jurisdiction.

GILLIAM, District Judge.

The instant suit is brought by three Negro doctors for themselves and for other Negro doctors, as a class, for the purpose of obtaining admission to practice medicine at James Walker Memorial Hospital on what is known as the "Courtesy Staff". The City of Wilmington and the County of New Hanover are made parties defendant in addition to the Hospital's Board of Managers and H. E. Hamilton who is Secretary of the Board. The defendants move to dismiss under Rule 12, Fed.Rules Civ.Proc. 28 U.S.C.A. for lack of federal jurisdiction. The facts of the case, as determined by pleadings and affidavits, appear to be as follows:

By virtue of Chapter 23 of the Public Laws of the North Carolina General Assembly of 1881, the City of Wilmington and the County of New Hanover were authorized to establish and maintain a hospital. Pursuant to this authorization land was acquired and the City Hospital of Wilmington became existent, subsequent expenses relating thereto being borne 40 percent by the City and 60 percent by the County.

In 1900 Mr. James Walker offered to build a modern hospital on the property then owned by the City and County and occupied by the City Hospital of Wilmington. The building used by the latter institution was removed, and construction of the new hospital was begun. The new building was finished after Mr. Walker's death and under the direction of his will.

[*Chartered by Legislature*]

As a result of Mr. Walker's offer, the defendant, Board of Managers of James Walker Memorial Hospital of the City of Wilmington, North Carolina, was chartered by the North Carolina legislature under Chapter 12 of the Private Laws of 1901. The purpose of this private law, as stated in its preamble, was to provide for the management of a hospital in New Hanover County and Wilmington, N. C., which hospital had been built with funds provided by one James Walker to provide for the maintenance and medical care of sick and infirm poor persons who might from time to time become chargeable to the charity of the City and County, and to provide for other persons who might be admitted. The charter further provided that it was desirable, and that the purpose of the act was to remove the management of the hospital as far as possible from the vicissitudes which generally result when such an institution is left in control of local municipal authorities. The act further declared that it was the purpose to provide for the permanent maintenance of the hospital by said City and County.

To this end the hospital was chartered as a body corporate with all the rights and privileges conferred upon corporations under law. The original Board of Managers of the hospital was appointed pursuant to this act. Three were elected by the Board of Commissioners of New Hanover County; two were elected by the Board of Aldermen of the City of Wilmington and four members were selected by Mr. James Walker. This board is self-perpetuating and has continued as such since its inception.

Upon the completion of the new James Walker Memorial Hospital building on July 19, 1901, the City of Wilmington and the County of New Hanover conveyed to the Board of Managers of James Walker Memorial Hospital of the City of Wilmington, N. C. a tract of land consisting of all of Block 227 of the City of Wilmington to hold "so long as the same shall be used and maintained as a hospital for the benefit of the County and City aforesaid, and in case of disuse or abandonment to revert to the said City and County as their interests respectively appear * * *." The deed specifically refers to the fact that the General Assembly has created and established a hospital under the supervision of a Board of Managers and the conveyance states that it is for the purpose of removing the management of the hospital as far as possible from the vicissitudes which generally result when such an institution is left under the control of municipal authorities. The effect of this deed was to convey to the original Board of Managers of James Walker Memorial Hospital of the City of Wilmington, N. C., a separate corporation, all of Block 227 of the City of Wilmington, N. C., which had on it a building which had been built with funds provided by the late James Walker. After the acquisition of this property additional buildings were built thereon and also an additional city block was acquired in fee simple by the Board of Managers upon which the south wing of the hospital is now located. The acquisition of the additional property was in fee simple without the restrictions set forth in the deed from the City and County.

[*Corporation Takes Over*]

After this conveyance was made the corporation created by the Private Law of 1901 took over the operation of the hospital. At the time of the institution of this suit none of the original members of the Board of Managers were still on the Board and no member of the City or County government is now a member of the Board or in any way in charge of the affairs of James Walker Memorial Hospital. The corporate charter gives the Board of Managers the absolute power to manage the hospital and to pass all rules and regulations necessary therefor, and since its inception the hospital has been operated, without interference or control by the City of Wilmington or New Hanover County, by its own self-perpetuating Board of Managers which have a separate corporate existence.

As was stated above, the Act of 1901 which chartered the hospital provided for funds in the annual amount of $8,000 from the City (40 percent) and County (60 percent) to maintain it. Subsequently additional acts were passed by the legislature to provide for maintenance as follows:

The Private Act of 1907, Chapter 38 of the North Carolina General Assembly, provided that annual appropriations could be made from public funds of the City of Wilmington and the County of New Hanover in order that the hospital be run in an efficient manner. The Public-Local Act of 1915, Chapter 66, provided that the appropriation for the support of the James Walker Memorial Hospital should be contributed and paid in equal proportions, one-half by the City and one-half by the County, and should not be less than an annual amount of $15,000 by said City and County. The Public-Local Act of 1937, Chapter 8, provided that a minimum annual appropriation of $50,000 would be necessary to give proper medical and hospital attention to the indigent sick and afflicted poor of the City and County, and said Act authorized and directed the City and County to make such minimum appropriation to enable the hospital to properly care for the indigent sick and afflicted poor and to renew its facilities and make additions to its physical plant. The Public-Local Law of 1939, Chapter 470, authorized the City and County to enter into contracts with the James Walker Memorial Hospital and to appropriate annually a sum not to exceed the amount of $25,000 each and authorized, if necessary, an additional tax levy. The Session Laws of 1951, Chapter 906, provided for contributions of the City and County to the James Walker Memorial Hospital to be on a per diem basis for the indigent sick and afflicted poor of said City and County.

Pursuant to all of the above statutes, the City of Wilmington, North Carolina, and the County of New Hanover made payments to the hospital up to the year 1951. In this latter year the provisions of the Act of 1901 relating to financing the hospital and all subsequent acts were declared unconstitutional by the Supreme Court of North Carolina in Board of Managers v. Wilmington, 237 N.C. 179, 74 S.E.2d 749. Since 1951 funds have been paid to the hospital by the City and County under contract pursuant to Article 14A of Chapter 153, General Statutes of North Carolina, enacted in 1953. The amounts so paid are as follows:

Year	*Receipts City of Wilmington*	*Receipts County of New Hanover*	*Total*	*Other Receipts*	*Total All Cash Receipts*
1952	$ 1,666.71	$22,482.89	$24,149.60	$ 897,912.18	$ 922,061.78
1953	None	21,672.75	21,672.75	952,847.27	974,520.02
1954	26,118.31	34,749.01	60,867.32	1,021,036.01	1,081,903.33
1955	12,945.67	33,339.73	46,285.40	1,034,859.40	1,081,144.80
1956	23,675.33	41,129.03	64,804.36	1,163,598.98	1,228,403.34
1957	1,738.00	58,533.05	60,271.05	1,352,238.51	1,412,509.56

At the present time the City does not have a contract with the hospital and in no way is a source of revenue for the same. The County, however, continues to pay according to contract for the care of indigent patients. The history of this contract and its terms are as follows:

On May 6, 1957, the County of New Hanover requested to be quoted the rates under which James Walker Memorial Hospital would undertake the care of certified indigent patients. On May 15, 1957, the hospital furnished the County of New Hanover with the following proposal:

> "The hospital will accept certified indigent patients for a per diem cost of $16.00. Of course, the County in its payment may deduct the $3.00 which the hospital will receive from other agencies for MCC (Medical Care Commission) cases, or $1.00 a day for SS (Social Security) cases.
>
> "In 1954 the hospital's per diem cost was $15.15 and the indigent care cost to the County was set at $15.00. In 1955 the hospital's per diem cost was $16.40, and in 1956 it was $17.60 not including depreciation. The average per diem cost for North and South Carolina hospitals in a category with this hospital was approximately $18.00 to $19.00.
>
> "In view of the data above, the Hospital Board of Managers feels that this rate is reasonable and will meet with your approval."

This proposal was accepted by the County and certified welfare patients are presently treated at a per diem cost of $16.

On March 19, 1955, the plaintiffs applied for "Courtesy Staff" privileges in the James Walker Memorial Hospital. The sole privileges of members of the "Courtesy Staff" is that they are allowed the use of private rooms and pay wards for their patients. Charity patients who are certified by the County are not treated by the "Courtesy Staff" members, and the "Courtesy Staff" members receive no part of the public funds which are paid for the per diem cost of treatment of charity patients. For the purpose of the instant motion, it is conceded that the applications for the "Courtesy Staff" privileges were properly made and that the plaintiffs were denied the same solely on account of their race.

[*Not "State Action"*]

On the above facts the defendants move to dismiss contending that the denial of "Courtesy Staff" privileges to the plaintiffs by the hospital is not State action within the purview of the Fourteenth Amendment, and, consequently, the litigation contains no basis for federal jurisdiction. The ultimate question, therefore, is whether the action of the hospital constituted public or private conduct. If the hospital is a private corporation, then its conduct is also private.

At the outset, it is manifest that the fact that the hospital's purpose is to promote the public

interest and convenience in providing a place for the sick and afflicted does not render the hospital a public corporation. This distinction is clearly set forth in the concurring opinion of Story, J., in the case of the Trustees of Dartmouth College v. Woodard, 4 Wheat. 518, 4 L.Ed. 629:

> "When, then, the argument assumes, that because the charity is public, the corporation is public, it manifestly confounds the popular, with the strictly legal, sense of the terms * * * When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustee of the public interest, to regulate, control and direct the corporation, and its funds and its franchises, at its own will and pleasure. Now such an authority does not exist in the government, except where the corporation, is in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself."

And further:

> "A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. * * * It was indeed supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so."

Rather than the nature of its purpose or objective, the legal test between a private and a public corporation is whether the corporation is subject to control by public authority, State or municipal. Mitchell v. Boys Club of Metropolitan Police, D.C., 157 F.Supp. 101.[1] The essence of this concept is that the present ability to control carries with it the responsibility for the present action of that which can be controlled.

[*Control Factor is a Composite*]

When considering the ability to control, it must be noted that it is a composite of elements, for there are as many elements of control as there are qualities and quantities in the controlled subject. The elements must be viewed in their relationship to each other and as part of a sum total, and for this reason each case must be viewed on its merits.[2] Past contacts with connotations of control have no importance other than to explain the existing relationship. In short, the present ability to control must be

1. A private hospital is defined in 41 C.J.S. Hospitals § 1, as one "Founded and maintained by private persons or a corporation, the state or municipality having no voice in the management or control of its property or the formation of the rules for its government." By implication, The Courts of North Carolina recognize this test in Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310.

2. For this reason the Court will not attempt to discuss and compare at length the cases of Kerr v. Enoch Pratt Free Library of Baltimore City, 4 Cir., 149 F.2d 212, and Norris v. Mayor and City Council of Baltimore, D.C., 78 F.Supp. 451, with the instant litigation. A summary comparison, however, is as follows:

	Enoch Pratt Library	*Maryland Institute*	*James Walker Memorial Hospital*
Value of plant owned and used by	None	$500,000 (Cost)	$756,000 (depreciated value)
Value of plant owned by City but used by	Over $4,000,000	Leased for $500 per year of one city building which for commercial purposes would rent for $12,000 a year	Land valued at $54,000. City and County have reverter only if abandoned by hospital in one-half of property
Annual gross income from property or activities of	$6,000 to $8,000	$184,000	$1,412,509.56—1957
Annual sums paid by City and State	Over $800,000	$42,500 (under contract for scholarships)	$60,271.05 (Paid under contract for indigents for services rendered)—1957
Proportion of public funds received to total budget	99%	About 23% (under contract)	About 4.6% (under contract)

determined by considering the sum total of all existing relationships between the corporation and the State.

Turning to an examination of the elements of State control as they extend to the hospital in the case at bar, it is noted that the charter of the corporation here involved was granted by the General Assembly of North Carolina pursuant to private act. This act created the corporation with its own Board of Managers and with full power and authority to set forth its own rules and regulations. The express purpose of the act was to remove this corporation and the hospital which it was to operate from the politics which are connected with local City and County governments. No element of control over the corporation was retained in either the City or the County after the initial appointment of the Board of Managers. Inasmuch as no member of the Board of Managers as originally appointed is presently connected with the hospital (all of these having been replaced by persons who were elected by the self-perpetuating board), this element of control has long since expended itself. The hospital receives at present from the County only 4.27% of its income, and this money is received by virtue of contract for services performed. For the past six years money so received has amounted to an average of 4.05% of total revenue. The County has no voice in how such money shall be spent. The hospital was not created for political purposes, nor endowed with political powers. It is not an instrument of the government for the administration of public duties.

[*Effect of Original City Ownership*]

The fact that one-half of the property presently owned by the hospital was originally owned by the City and County has no bearing on present control. This Court knows of no authority which holds that the bona fide conveyance to a private corporation of public lands in turn makes a private corporation an agency of the State or creates the status of a public corporation. Indeed the conveyance was in good faith and for the very purpose of removing the City's and County's control with regard to the property. The deed clearly accomplished this purpose. The only way the City and County can claim an interest in the property or any control over the property would be in the event that the hospital ceased to be used for the care of the sick and afflicted of New Hanover County. The purpose and effect of the deed is to carry out the intent of the charter to create a public charity but not a public corporation. The City and County may eventually regain the property, but this possibility is distinctly within the control of the hospital corporation. Only the latter possesses initiative with regard to the same.

The past contributions to the hospital by the City and County under the acts of the legislature, which were later declared invalid in Board of Managers v. Wilmington, supra, are not sufficient to convert the hospital into a public corporation. Mitchell v. Boys Club of Metropolitan Police, supra. In this regard the following comment of Judge Chesnut in Norris v. Mayor and City Council of Baltimore, D.C., 78 F.Supp. 451, 460, seems appropriate:

> "Counsel for the plaintiff advances a new and far-reaching proposition not within the principle of the Pratt Library Case. The contention is that whenever the State or Baltimore City as a municipal agency of the State, advances money to a private corporation of an educational nature in an ap-

	Enoch Pratt Library	*Maryland Institute*	*James Walker Memorial Hospital*
Public status of employees	Included in municipal employees retirement system	None	None
Control of disbursements by city	Made through City Bureau of Control and Accounts on vouchers submitted by Trustees	None	None
Salary checks for employees	Issued by City Payroll Officer	None	None
Salary of employees	Conform to City salary schedule	None	None
Control of Budget	Submitted to municipal budget authorities	None	None

preciably substantial amount which thereby becomes mingled with other general funds of the institution, that action of the institution or City thereby becomes State action within the scope of the 14th Amendment. No authority is cited for this proposition and I know of none. In my opinion it is untenable."

In addition the past contributions do not have any relative bearing on the matter of the control of the hospital; and the possibility of any such contributions in the future has been foreclosed by judicial decision of the State of North Carolina.

In summation, the only links between the State of North Carolina and the hospital are these: 1.) the City and County have a reverter in one-half of the hospital's land should the same fail to be used for hospital purposes; 2.) the County pays at a rate provided by contract for the treatment of indigent patients. These factors do not carry with them such control as to render the hospital a public corporation. The Court concludes, therefore, that the plaintiff is not entitled to the declaratory judgment prayed for because the act of discrimination did not constitute "State action". It results that for the lack of jurisdiction the complaint must be dismissed, and it is so ordered.

GOVERNMENTAL FACILITIES
Private Trusts—New Jersey

Allen M. MILLS and Joseph M. Hamilton, Executors of the Estate of Laura E. W. Tyler, Deceased v. THE CITY OF PHILADELPHIA acting through the Board of City Trusts, et al.

Superior Court of New Jersey, Chancery Division, September 2, 1958, 144 A.2d 728.

SUMMARY: A resident of New Jersey died leaving a will that provided for two trusts. The beneficiaries of one trust, the income from which was to be used for food and clothing, were limited to "White, American born, needy and dependent wives, and, to white, American born, needy and dependent children under fourteen years of age of felons" committed to a penitentiary in Pennsylvania. The beneficiaries of the second trust, the income of which was to be used for free hospitalization in a certain Philadelphia hospital, were limited to "white, American born, needy children under fourteen years of age, such children not to be chronic cases nor children of an intelligence quotient of less than seventy-five." The trustee named for both trusts was "The City of Philadelphia, Pa., acting by the Board of Directors of City Trusts." The executors of the estate brought an action in a New Jersey state court against the named trustee raising the question of legality of the trusts in view of the decision of the United States Supreme Court in the recent *Girard College* case [Commonwealth of Pennsylvania v. Board of Directors of City of Philadelphia, 353 U.S. 230, 2 Race Rel. L. Rep. 591 (1957)]. [For subsequent proceedings in this case, see 2 Race Rel. L. Rep. 811 (1957); 2 Race Rel. L. Rep. 992 (1957); 3 Race Rel. L. Rep. 188 (1958); 3 Race Rel. L. Rep. 424 (1958)]. The New Jersey Court interpreted the *Girard College* case to mean that the Fourteenth Amendment does not prevent an individual from setting up a trust in favor of beneficiaries of a particular race only, but that a state agency may not participate as trustee in such discrimination. The court, rejecting the contention that *Girard* was limited to education, held that case controlled the present one, prohibiting defendants from exercising the quoted discriminatory provisions. The court, therefore, removed defendants and appointed a New Jersey private corporation as substitute trustee.

LESTER A. DRENK, J. C. C. (temporarily assigned).

This is an action by the executors of the estate of Laura E. W. Tyler, deceased. The first count of the complaint raises the question of the legality of two certain trust funds created under the will of the decedent and seeks instructions in regard thereto. All other matters raised in the pleadings have been heretofore determined.

I.

Two charitable trusts were created by the testatrix in her last will and testament in the following language:

> "All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath to 'The City of Philadelphia, Pa., acting by the Board of Directors of City Trust,' in Trust, as a separate and permanent fund, to hold, invest and re-invest the same, to collect the income and after paying all expenses, incident to the management of the trust, to use one half of the annual net income arising therefrom, to be known as 'The Henry L. Wilkinson Fund' to provide food and clothing for White, American born, needy and dependent wives, and, of white, American born, needy and dependent children under fourteen years of age of felons committed to 'The Eastern State Penitentiary', now at 21st and Fairmount Avenue, Philadelphia, Pa., or wherever the same may be located, or, the institution that later takes its place; and, to use the other half of the annual net income arising therefrom, to be known as 'The Mercy A. Wilkinson Fund' either for free hospitalization at Hahnemann Hospital, now located on Broad St. above Race Sts., in the City of Philadelphia, Pa. or the institution that takes its place, or treatments at home or in clinic by said Hahnemann Hospital or its successor of white, American born, needy children under fourteen years of age, such children not to be chronic cases, nor children of an intelligence quotient of less than seventy-five."

Plaintiffs seek construction of the above article because of the named trustee and because the beneficiaries of the first-mentioned trust are limited to "white, American Born, needy and dependent wives and of white, American born, needy and dependent children under 14 years of age of felons committed to the Eastern State Penitentiary, now at 21st and Fairmount Avenues, Philadelphia, Pa.," and the beneficiaries of the second mentioned trust are limited to "white, American born, needy children under 14 years of age, such children not to be chronic cases nor children of an intelligence quotient of less than seventy-five."

The doubt has arisen in the minds of the executors by reason of the decision of the United States Supreme Court in the case of Commonwealth of Pennsylvania v. Board of Directors of City of Philadelphia, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957). In this case, the Supreme Court of Pennsylvania originally held that the will of Stephen Girard and the testator did not violate the 14th amendment of the United States Constitution, because of the exclusion of Negro orphans from Girard College, Girard Will Case, 386 Pa. 548, 127 A.2d 287 (Pa.1956). This decision was appealed to the United States Supreme Court, supra.

[*Prepared Own Will*]

Before discussing the application of the Girard College case, it seems advisable to set forth briefly some of the facts concerning the decedent Laura E. W. Tyler. She was a retired school teacher. She had graduated from Bryn Mawr College; earned a degree of law at Temple University and a master's degree at Columbia University. Her will and codicils, except one, were prepared by herself. Those that she prepared were in her own handwriting and apparently she sought no legal advice other than her own in reference to the preparation of her will and codicils.

Decedent died July 13, 1956, a resident of the City of Ventnor, Atlantic County, New Jersey. The plaintiffs qualified as executors before the Surrogate of Atlantic County, November 28, 1956.

By reason of her education and interest in education, due to her employment, it is reasonable to assume that the decedent had some knowledge of the creation, administration and operation of Girard College. Why she was interested in the classes who are to benefit under the terms of the trust created in her will does not appear. It was also quite apparent that she had not forecast nor was information available to her as to the action of the United States Supreme Court in regard to the provisions of the trust created under the will of Stephen Girard.

[*Girard Case Discussed*]

A concise statement of facts as to the litigation in the Girard estate appears in the brief submitted on behalf of the City of Philadelphia acting by the Board of Directors of City Trusts. The following history is given on pages 5, 6, 7, 8, of said brief.

"The basis of any challenge of The City of Philadelphia as Trustee under Item IX of the testatrix's will, must be the decision of the Supreme Court of the United States in Commonwealth of Pennsylvania et al v. Board of Directors of City Trusts [of Philadelphia], 353 U.S. 230, 77 S.Ct. 806 [1 L.Ed.2d 792].

"That case had its inception in the application of two colored boys for admission to Girard College. The Board of Directors of City Trusts rejected them on the score of ineligibility as Stephen Girard had bequeathed and devised his residuary estate to The City of Philadelphia to erect, operate and maintain, as the primary object of his bounty, an institution for the shelter, maintenance and education of poor, white, male orphans. The Orphans' Court of Philadelphia County sustained the Board. Girard Estate, 4 [Pa.] D[ist.] & C[o. R.]2d 671, 5 Fid.Rep. 449, 6 Fid.Rep. 57. The Supreme Court of Pennsylvania affirmed Girard Will Case, 386 Pa. 548, 127 A.2d 287. The applicants thereupon filed an appeal in the United States Supreme Court. The Board of Directors of City Trusts moved to dismiss for want of jurisdiction. The Court sustained the motion, treated the appeal as a petition for certiorari, which it granted and entered the following order. Commonwealth of Pennsylvania et al v. Board of Directors of City Trusts [of Philadelphia], 353 U.S. 230 [77 S.Ct. 806, 1 L.Ed.2d 792].

> " 'The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.'

"On June 28, 1957, after remand from the United States Supreme Court, the Supreme Court of Pennsylvania entered the following order.

> " 'Now, Therefore, in obedience to the mandate of the Supreme Court of the United States, a true and correct copy whereof is appended hereto,—
>
> " 'The decrees of the Orphans' Court of Philadelphia County are vacated at the appellee's costs and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its mandate.'

"On September 11, 1957, the Orphans' Court of Philadelphia County entered this decree (Girard Estate, 7 Fid. Rep. 553, 558)

> " 'And Now, this 11th day of September, 1957, in obedience to the mandate of the United States Supreme Court dated June 11, 1957, and the order of the Supreme Court of Pennsylvania filed June 28, 1957, and in conformity with the opinion of the Supreme Court of Pennsylvania, dated November 12, 1956, it is hereby ordered and decreed that:
>
> " '1. The petitions of William Ashe Foust and Robert Felder for admission to Girard College are dismissed.
>
> " '2. The Board of Directors of City Trusts of the City of Philadelphia is removed as trustee of the estate of Stephen Girard, deceased, effective upon the appointment of a substituted trustee by this court.
>
> " '3. The Board of Directors of City Trusts of the City of Philadelphia is directed to transfer and deliver the records and assets of the estate of Stephen Girard, deceased, to the substituted trustee, promptly, after such substituted trustee has been appointed and duly qualified.
>
> " '4. The Board of Directors of City Trusts of the City of Philadelphia is directed to file an account of its administration of the estate of Stephen Girard, deceased, within six months after the date of this decree.'

"In three separate per curiam opinions, petitions by the Commonwealth of Pennsylvania, The City of Philadelphia and the two

colored applicants for vacation or modification were dismissed. 7 Fid.Rep. 608. By decree dated October 4, 1957, the Orphans' Court of Philadelphia County appointed substitute trustees for the estate of Stephen Girard, deceased.

"Appeals from the several decrees of the Orphans' Court were taken promptly by the Commonwealth of Pennsylvania, The City of Philadelphia and the two applicants for admission. The Supreme Court of Pennsylvania, in an opinion by its Chief Justice, affirmed the decrees. [In re] Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844.

"An appeal was then taken to the United States Supreme Court, whereupon the appellees filed a motion to dismiss. On June 30, 1958 the Supreme Court of the United States entered the following Order:

> "'The Motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.'"

[*Relation to Present Case*]

The prime question raised by the parties hereto is, of course, the application of the ruling in the Girard case by the United States Supreme Court to the present matter. The main difference in the present contention seems to be that the United States Supreme Court, in its decision, limited its findings to the field of education; and that its ruling is not to be construed as limiting the Board of Directors of City Trusts in administering trusts with similar limitations as to color outside the field of education. This I do not find to be so.

It appears to me that the basis of the decision of the United States Supreme Court is the fact that the Board of Directors of City Trusts is an agency of the State of Pennsylvania and that an agency of the state is prohibited, under the 14th amendment, from participating in any act of discrimination, as would be the state itself. I can find no expression which would indicate that the opinion and the findings therein, in this regard, were limited solely to the field of education. It is to be noted that at no time did the United States Supreme Court indicate that the trust established under the will of Girard was in itself violative of the 14th amendment, but only that the trustee board as a state agency could not deny admission to Girard College on a discriminatory basis. The court in no way indicates any restriction on the right of an individual to limit the individual's right to create trusts for the benefit of any person, class or legal objective whatsoever, whether the trust so created is limited or discriminatory in any way or not. To have held otherwise would have established a precedent prohibiting anyone from bequeathing or devising his property other than to or for the benefit of all persons, or all objects of a testator's bounty. Carrying such a prohibition to its natural conclusion, no one would be permitted to create trusts or give to a class favoring his church, his fraternal organizations, his charitable interests, or, his national origins. This, in no way, appears to be the intention of the United States Supreme Court in its opinion. It does, however, specifically hold that a state agency, regardless for what purpose or reason created, is prohibited under the provisions of the 14th amendment from exercising any discrimination prohibited thereunder; even though the trust sought to be administered provides for such discrimination and is completely lawful and within the established rights of an individual to create.

[*Will Lawful*]

I, therefore, find that the trust created by the decedent Laura E. W. Tyler, in her last will and testament to be lawful and limited to the classes for which she made provision. I further find that the Board of Directors of City Trusts of the City of Philadelphia is prohibited under the findings of Commonwealth of Pennsylvania v. Board of Directors of City of Philadelphia, supra, from exercising the discriminatory provisions of the trust so established. For that reason the Board of Directors of City Trusts of the City of Philadelphia is removed as trustee of the Estate of Laura E. W. Tyler, deceased, effective upon the appointment and qualification of a substituted trustee by this court.

A more difficult question has been raised by counsel for the City of Philadelphia acting by the Board of Directors of the City Trusts, that is, whether this court should relinquish its jurisdiction over the trust and trustees and direct that the trust be administered in the courts of Pennsylvania rather than the courts of New Jersey, relying primarily upon the case of Martin v. Haycock, 22 N.J. 1, at pages 5 and 6, 123

A.2d 223, at page 225 (1956), wherein Justice Brennan speaking for the court states:

> "The general rule is that, unless an intention that administration is to be supervised by the courts of his domicil is expressed by the testator in his will or is clearly to be collected therefrom, the courts of the testator's domicil will not ordinarily administer a foreign charity created by his will but will direct that the money be paid over to proper persons at the locus of the charity, leaving its administration to the courts of that place. This is so at least when the charity is not repugnant to our laws and is in accordance with the laws of the foreign place, attributes conceded to be true of Dr. Sweeney's charity."

[*Importance of Municipality's Role*]

Great stress is laid upon the fact that the testatrix chose a Pennsylvania municipality acting through its Board of Directors of City Trusts as the trustee; that two Philadelphia institutions, one a state penitentiary, were used in limiting the classes to benefit. I can find nothing in the trust established which indicates, in any way, that the place of residence of the objects of the testatrix' bounty is to be in any way controlling. Neither class is limited to residents of Pennsylvania. The mere fact that a felon has been required to serve a term at the Eastern State Penitentiary or that a patient receives treatment at Hahnemann Hospital does not in any way raise a presumption that such persons and their families are Pennsylvania residents. They might very well be residents of any of the 48 states or foreign countries. There is no doubt, of course, that the testatrix placed great confidence in the trustee she selected, and having been active in the field of education and the holder of a degree of law from a Philadelphia University there can be no doubt that she was well aware of the successful administration of Girard College by the named trustee. As heretofore held, however, the named trustee is legally incapable of carrying out the expressed wishes of the testatrix, and it becomes necessary for the court to appoint a substituted trustee. If it appears from the will of the testatrix that it was her intention to have the trusts administered in the courts of Pennsylvania, then there is no doubt but that a Pennsylvania trustee should be substituted and the court of that state acquire jurisdiction. Such does not clearly seem to be the intention of the testatrix. Looking to her appointment of executors to administer her estate prior to the trust, the complaint demonstrates that two individuals, one a resident of New Jersey and the other a resident of Philadelphia, were so nominated. Both have qualified. Nor is it clear that other than confidence in the City of Philadelphia acting through the Board of Directors of City Trusts, the testatrix gave consideration to the administration of her trust by the State of Pennsylvania, except as the classes to benefit under the trusts are limited by the naming of the two Philadelphia institutions.

I am of the opinion, that at this time, there is some uncertainty as to whether the trusts can more effectually be performed with out-of-the-state trustees or whether the interest of all the beneficiaries will best be served by such out-of-the-state trustees.

[*Might Remove Jurisdiction*]

Should it appear, at some later date, that the administration of the trusts from New Jersey would be inefficient and unduly expensive, then this court, upon proper application should give consideration to the possible removal of the administration of the trust to the jurisdiction of Pennsylvania.

In the case of Martin v. Haycock, supra, Justice Brennan at pages 12 and 13, of 22 N.J., at page 229 of 123 A.2d states;

> "The conclusion seems unavoidable that the continued administration of this charity from New Jersey can only be inefficient and unduly expensive, not alone from a consideration of the high expenses for travel which must be incurred if the New Jersey trustees continue their supervision, but from the nature and extent of the services which must be secured locally if the library is to be well and efficiently run in the absence of the trustees. It is difficult to envisage a case more appropriate for administration at the locus, and where remote administration from New Jersey is more unseemly. Our courts would be remiss in our obligation to this New Jersey testator if they continued longer to risk the possible impairment of the testator's purpose necessarily implicit in the factors of distance and want of knowledge of the local customs and conditions which

disable our courts and its trustees from the fully efficient performance of the duties of administering the charity at minimum expense.

"It should be emphasized that our trustees are co-trustees substituted for the trustee of the testator's own selection. The choice of a substituted trustee brings into play the three objectives sought to be served by his selection, namely, the wishes of the creator of the trust, the interests of all the beneficiaries, and the effectual performance of the trust. In re Tempest, 1 L.R. 485 (Ch.App. 1866); 4 Pomeroy's Equity Jurisprudence (5th ed.), sec. 1087, p. 261; 1 Restatement, Trusts, sec. 108(d). However proper the original appointment of the substituted co-trustees before the library was built, when the court might reasonably have felt an uncertainty as to whether the gift should be committed to other hands pending the formulation of definite plans, now that the library is in being and the problems of its management have become uppermost, the transfer of the trust for administration in Ireland best serves all three objectives, and the substituted co-trustees should be relieved of further responsibility in that regard."

It is to be noted that the latter part of the quotation Justice Brennan indicates that in the first instance the appointment of the substituted co-trustee therein was proper, because the court might reasonably have felt an uncertainty as to whether the gift should be committed to other hands or another jurisdiction pending the formulation of definite plans. This clearly expresses the position of the court in the present matter.

[*Retains Jurisdiction*]

I therefore find that until such time as it is demonstrated that the administration of the trusts from New Jersey is inefficient and unduly expensive, and that the natural extent of the service to be rendered cannot be well and efficiently administered, that this court should not relinquish administration of the trusts to the courts of the State of Pennsylvania. While I note that the decedent died a resident of Atlantic County, and as a consequence I would ordinarily select a trustee from the county of the decedent's residence, I recognize the fact that there might be some delay in the administration of the trusts in this case at such a distance from Philadelphia. However, it appears to me that no great difficulties or delays will be experienced in the administration of the trusts by the selection of trustee from the City and County of Camden immediately adjacent to Philadelphia and just as accessible as center city Philadelphia to either of the institutions named in the trusts.

For the reasons just expressed, I hereby designate and appoint Camden Trust Company as substituted trustee in the place and stead of City of Philadelphia acting by the Board of Directors of City Trusts. Upon the presentation of a judgment embodying the findings herein, the same will be signed.

GOVERNMENTAL FACILITIES
Metropolitan Redevelopment—Alabama

E. F. BARNES, et al. v. The CITY OF GADSDEN, Alabama, et al.

United States District Court, Northern District of Alabama, Middle Division, August 19, 1958, Civ. No. 1091.

SUMMARY: In a class action against the City of Gadsden and its Housing Authority, four Negro citizens sought to enjoin the Authority from proceeding with slum clearance and urban redevelopment plans. Plaintiffs alleged that the program would discriminate against the Negroes. The Authority had submitted plans specifying covenants against racial discrimination to obtain federal aid, and the city had not passed any ordinance, resolution or regulation requiring residential segregation. The court held the threat of immediate and

irreparable damage had not been shown and denied the preliminary injunction. 3 Race Rel. L. Rep. 712. After hearing on the merits of the request for a declaratory judgment and a permanent injunction the court entered judgment for the defendants. The court declared that if private interests should restrict sales and occupancy along racial lines in the future such would not be "state action" in violation of plaintiffs' rights. The court also refused as an alternative to require the Authority to grant prior rights of purchase in favor of former residents of the areas, stating, "the law does not compel integration, whatever the guise under which relief is sought. It only prohibits enforced segregation."

GROOMS, District Judge:

JUDGMENT

Pursuant to and in conformity with the Findings of Fact and Conclusions of Law entered contemporaneously herewith, the Court is of the opinion that the plaintiffs are not entitled to the relief prayed for and that judgment should be entered in favor of the defendants.

It is, therefore, ORDERED, ADJUDGED and DECREED that judgment be and the same is hereby entered in favor of the defendants in this cause, with costs taxed against the plaintiffs, for which execution may issue within the time and manner required by law.

Done and Ordered, this the 19th day of August, 1958.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction of this Court is invoked under Title 28, U.S.C.A., §§ 1331 and 1343 (3). Plaintiffs charge a violation of the due process, equal protection and privileges or immunities clauses of the Fourteenth Amendment to the Constitution of the United States, and Title 42, U.S.C.A., §§ 1981 and 1982. Relief is sought under Title 42, U.S.C.A., § 1983, and the Federal Declaratory Judgment Act, 28 U.S.C.A., §§ 2201 and 2202.

The cause was heard on the motions to dismiss, and on the merits pursuant to the stipulation of the parties.

FINDINGS OF FACT

1. The defendant, City of Gadsden, is a municipal corporation, the defendant, Greater Gadsden Housing Authority, hereinafter called the "Authority", is a body corporate organized and existing under the laws of the State of Alabama [1], and defendant, Walter B. Mills, is Executive Secretary and Chief Administrative Office of the Authority. The Authority has adopted plans for the redevelopment of two areas of the City of Gadsden known as the Birmingham Street Area and the North Fifth Street Area. These areas are slum and blighted areas. Plaintiffs are four Negroes who own property in the Birmingham Street Area.

2. Within the boundaries of the Birmingham Street Project Area to be redeveloped are 311 dwelling units occupied by approximately 355 Negro families, of which 54 are owner occupied and 259 are tenant occupied. There are 22 dwelling units occupied by approximately 23 white families, of which seven are owner occupied and 15 are tenant occupied. Fifty-eight or 17.4 per cent of the total units are owned by Negroes and 275 or 82.5 per cent by white people. Seventy-five per cent of all structures in the Area are substandard and incapable of being rehabilitated.

3. Within the boundaries of the North Fifth Street Project Area to be redeveloped are 11 dwelling units occupied by approximately 13 Negro families, of which five are owner occupied and six are tenant occupied. There are 31 dwelling units occupied by approximately 31 white families, of which eight are owner occupied and 23 are tenant occupied. Five or 11.9 per cent of the units are owned by Negroes and 37 or 88.1 per cent by white people. Eighty and nine-tenths per cent of all structures in the Area are substandard and incapable of being rehabilitated.

4. Acting under the Urban Redevelopment provisions of the Housing Act of 1949, as amended, 42 U.S.C.A., § 1450 et seq., the Authority has taken steps to obtain federal aid to assist in acquiring ownership of the property in these areas and for clearing same for redevelopment. A commitment for this purpose has been issued. The City of Gadsden has agreed to provide a portion of the costs as required by the

1. Title 25, Code of Alabama 1940 and Amendments thereto.

Federal Act and as authorized by the laws of the State of Alabama, above referred to.[2]

5. The Authority is now engaged in obtaining the property located within the two areas by voluntary conveyances or by the power of eminent domain, and plans to clear the areas by demolishing the dwellings thereon, placing new streets and the required utilities, and otherwise improving the areas. When this has been accomplished, it will then sell the two areas to private individuals or redevelopers who shall be obligated to devote such property to the use as specified in the urban redevelopment plan for each area.

6. Before the Authority could obtain financial assistance from the Housing and Home Finance Agency, Urban Renewal Administration, comprehensive and detailed plans were required. These have been prepared, investigation made, the plans approved, and the financial assistance made available by the commitment referred to. Each of these plans contains an anti-racial covenant reading as follows:

> "(C) Anti-Racial Covenant—No covenant, agreement, lease, conveyance or other instrument shall be effected or executed by the Housing Authority, or by the purchasers or leasees from it, or any successors in interest of such purchasers or leasees, whereby land in the Project Area is restricted upon the basis of race, creed, color, or national origin in the sale, lease of occupancy thereof."

The plans were approved by the City of Gadsden, whose only function is to provide its one-third of the net cost of the redevelopment and slum clearance. The execution of the plans will be under the direction of the Authority.

7. Many years ago, the City of Gadsden created a City Planning Commission. This Commission prepared a comprehensive outline of future municipal development known as the "Gadsden Plan." This plan includes subdivision regulations and zoning ordinances that cover and apply to all of the territory within the City.

8. Plaintiffs do not challenge the desirability of slum clearance and rehabilitation of substandard areas such as are here involved. They say that because they are Negroes and because the private, as well as the public, housing market in Gadsden is a racially discriminatory one and is based on the policy, custom and usages of residential segregation, they are unable to bargain for their shelter on equal terms with others, and, therefore, need the protection of this Court with respect to any housing program in which public officials participate and make possible.

9. Whether by choice motivated perhaps by the gregarious nature of the peoples of the Negro race, by custom accepted or acquiesced in by the members of that race, or by their exclusion from other areas by racially restrictive covenants in leases and conveyances, or by a combination of these factors, there have developed racially segregated residential areas in the City of Gadsden. The City, however, has adopted no ordinance or resolution based upon a policy, custom and usages of initiating, encouraging, enforcing and perpetuating residential segregation of the Negro and white races within its corporate limits. The City has neither by resolution, ordinance, nor other official action adopted any plans intended to or that will have the effect of rezoning the Negro or white residential areas within its limits and restricting the areas which will be available to the plaintiffs and members of their class for future residential purposes, nor has the City adopted any resolution, ordinance or zoning regulation restricting any area so as to make the same unavailable to the plaintiffs and members of their class for residential purposes. The only zoning ordinance of the City applicable to residences applies to all persons and is based on types of dwellings and not on types of occupants or ownership.

10. The City of Gadsden has neither instituted nor caused to be instituted any proceedings for the purpose of acquiring title to the lands of the plaintiffs or other members of their class. The City does not propose to institute or cause to be instituted any such proceedings. The City of Gadsden, by no official act, has made any attempt to require the plaintiffs to purchase houses in the North Fifth Street Area or forbidden them either to occupy or purchase houses in the Birmingham Street Area.

11. The plans of the Authority are for the elimination of substandard and inadequate housing, regardless of ownership or occupancy,

2. Opinion of the Justices, 48 So.2d 757, 254 Ala. 343, holding that the Act providing for redevelopment of slum areas are constitutional. Gen. Acts, 1949, p. 713. See also 1955 Act, now Title 25, § 105 et seq., Supp. to Alabama Code 1940, covering Urban Renewal Projects.

through the clearance of slums and blighted areas in which private enterprise will be encouraged to serve as large a part of the total need as possible. The plans do not include low-rent housing programs administered or assisted by the Public Housing Authority or other public agencies.

12. No evidence has been presented that the Authority, or the City, has included in the plan for the redevelopment of the Birmingham Street Area that sales by private purchasers or private redevelopers will be restricted to white people only or that the plaintiffs and members of their class will not be permitted to purchase same solely because of race or color. There is no evidence that by any plan for redevelopment and sale only plaintiffs or members of their class will be permitted to own or occupy the lots in the North Fifth Street Area. The evidence likewise fails to reveal that the Authority has any plan for sales of dwellings in the involved areas after redevelopment in contravention of the Anti-Racial Covenant hereinabove quoted. As to each such contention the evidence and its tendencies are to the contrary.

CONCLUSIONS OF LAW

The Court concludes from an analysis of plaintiffs' complaint, evidence and arguments that their claim for relief is grounded primarily on the apprehension that when the two areas are cleared and rehabilitated and sold to private interests under legitimate restrictions as to use that plaintiffs and members of their class will not be able to purchase property in the Birmingham Street Area because of their race or color, Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133, cert. denied 337 U.S. 981, and that if they purchase homes in the North Fifth Street Area they will be racially segregated in that area, and, therefore, they should be delivered from the apprehension of this possible dilemma by injunctive relief, preventing the carrying out of the plans which, they insist, constitute a scheme and design for initiating, enforcing, extending and perpetuating racial segregation in residential areas of Gadsden in violation of their constitutional rights. Otherwise, they see no escape from their anticipated predicament once the properties are sold to private interests; and they are fearful in that event that their last state will become worse than their first.

The proposed clearance in the Birmingham Street Area will eliminate a largely racially-segregated section. The Authority is prohibited from imposing racially-discriminatory restrictions upon resale. Plaintiffs insist that these Anti-Racial Covenants are mere window dressings, and that the only alternative to that of enjoining the carrying out of the plans, is to require the Authority to include a provision in its conveyances granting to those now residing in that area a prior right of purchase. It would appear needless to observe that if such right is granted and the present residents choose to exercise it, resegregation rather than desegregation will result, since, as noted, practically the entire area is now occupied by Negroes. In any event, the law does not compel integration, whatever the guise under which relief is sought. It only prohibits enforced segregation. Cohen v. Public Housing Administration, 5 Cir. MSS.

It will be presumed that the City of Gadsden, its officers and agents, will act in good faith in discharging their duties and in observing the constitutions and laws, state and federal. Bad faith cannot be imputed, Pilcher v. City of Dothan, 93 So. 18, 207 Ala. 421; Jewel Tea Co. v. City of Troy, 7 Cir., 80 F.2d 366; Royal Oaks Drain District v. Keefe, 6 Cir., 87 F.2d 788; Davis v. Arn, 5 Cir., 199 F.2d 424; Clarence C. Walker Civic League v. Board of Public Instruction, 5 Cir., 154 F.2d 726.

In the last-cited case, a county school board ordered a split session in a Negro school during the war emergency to make children available for agricultural labor for the winter farming season. Following the cessation of hostilities, certain Negro citizens, parents of the children, filed a bill for an injunction. Relief was denied. On appeal the Court held that in the absence of any showing of the probable continuance of the practice, it would be presumed that the public officers concerned would do their duty and return to the normal operation of the schools in effect before the occurrence of the emergency.

The presumption that public officers will in good faith discharge their duties and observe the law is a very strong presumption, 20 Am. Jur. 174, and will prevail until overcome by clear and convincing evidence to the contrary. National Labor Relations Board v. Bibb Mfg. Co., 5 Cir., 188 F.2d 825.

If the Court assumes that private interests will restrict sales in the Birmingham Street Area to white people and the North Fifth Street

Area to colored people, such sales would not be actions under color, authority, or constraint of state law, nor would they be the performances of functions of a governmental character. Dorsey v. Stuyvesant Town Corp., supra, Johnson v. Levitt & Sons, Inc., E.D. Pa. 131 F.Supp. 114.

In Shelley v. Kraemer, 334 U.S. 1 (13), 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441, the Court said:

> "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*" (Emphasis supplied.)

This action of a governmental agency acting within its authority will not be controlled or revised by injunction. Brammer v. Housing Authority, 195 So. 256, 239 Ala. 280. The City, the Authority, and defendant Mills were acting within the authority of law in making the contract for the undertaking here challenged.

The exercise of jurisdiction under the Federal Declaratory Judgment Act is discretionary and not compulsory. Smith v. Mass. Mut. Life Ins. Co., 5 Cir., 167 F.2d 990; Brillhart v. Excess Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620. The remedy by injunction is likewise discretionary. Peay v. Cox, 5 Cir., 190 F.2d 123. This case is void of evidence that would invite the Court's discretion in either particular. Judgment will be entered in favor of the defendants with their costs.

Dated, this the 19 day of August, 1958.

INDIANS

Indian Lands—New York

TUSCARORA NATION OF INDIANS v. POWER AUTHORITY OF THE STATE OF NEW YORK, et al.

United States District Court, Western District, New York, June 24, 1958, 164 F.Supp. 107.

SUMMARY: The Tuscarora Indian Nation, in April, 1958, brought an action in Federal court in New York, seeking an injunction and a declaratory judgment against the appropriation of tribal lands by The State Power Authority. After a temporary injunction had been granted the court also granted defendant's motion for a change of venue to the district where the disputed lands are situated. 161 F.Supp. 702, 3 Race Rel. L. Rep. 715 (S.D.N.Y. 1958). In the Western District of New York the complaint was dismissed. That court held that if the fee to the lands was not in the state, it was privately held and subject to the state's power of eminent domain, there being no bar to the exercise of this power under Federal law. The court declared that there was statutory authority for plaintiff to bring suit in the New York Court of Claims to determine the amount of just compensation for the taking, and that that court was the proper forum for such a question.

MORGAN, District Judge.

The complaint in this action was filed in the Southern District of New York on April 19, 1958. The action is one for declaratory judgment, wherein the plaintiff prays:

(1) That it have a judgment and decree of this court defining its rights and status therein, particularly adjudicating that neither of the defendants, nor any of them, had any right, authority or power to acquire, or attempt to acquire, by appropriation or otherwise, any or all of the lands belonging to plaintiff within the Tuscarora Reservation;

(2) That a temporary restraining order be granted restraining and enjoining the defendants and each of them and their agents, servants, employees and attorneys, and all persons in

active concert and participation with them, from entering upon, or taking any action with regard to any appropriation of land belonging to the plaintiff within the Tuscarora Reservation;

(3) That a permanent injunction permanently granting the relief sought by the temporary restraining order be granted;

(4) That this court set aside, vacate and annul all descriptions, maps, notices and other instruments in connection with the purported appropriation.

[*Recognized Tribe*]

The complaint alleges that plaintiff is a recognized tribe of American Indians residing on the Tuscarora Reservation in Niagara County, New York. The complaint further alleges the existence of an actual controversy "which is definite, concrete, real and substantial, which involves and affects the legal relations of plaintiff and defendants, and vitally affects the public interest." This action is brought under Sections 2201 and 2202, Title 28 U.S.C. and the complaint alleges jurisdiction by reason of Title 28 U.S.C. Section 1331. The plaintiff claims relief under Article I, Section 8, of the Federal Constitution, authorizing Congress to regulate commerce with the Indian tribes, and Treaties of October 22, 1784,[1] 7 Stat. 15, and November 11, 1794,[2] 7 Stat. 44, entered into by the United States and the Six Nations of Indians, including plaintiff, and R.S. Section 2116, 25 U.S.C.A. § 177, and the Act of September 13, 1950, 25 U.S.C.A. § 233, relating to the alienation of Indian lands.

The defendant Power Authority of the State of New York is a corporate instrumentality and a subdivision of the State of New York. The defendant Robert Moses is the Chairman of the Power Authority of the State of New York and the defendant John W. Johnson is the duly appointed and acting Superintendent of Public Works of the State of New York.

It further appears that Averell Harriman, Governor of the State of New York, on April 11, 1958 signed into law Chapter 646 of the Laws of 1958, amending paragraph 1 of Section 1007 (10) of the Public Authorities Law, as follows:

> "The authority may determine what real property is reasonably necessary for the improvement and development of the Niagara River or the International Rapids section of the St. Lawrence River. If funds are made available by the authority to the state for payment of the cost and expense of the acquisition thereof, the superintendent of public works, when requested by the authority, shall acquire such real property in the name of the state by appropriation and, where necessary, remove the owner or occupant thereof and obtain possession, according to the procedure provided by section thirty of the highway law, insofar as the same may be applicable. The authority shall have the right to possess and use for its corporate purposes, so long as its corporate existence shall continue, all such real property and rights in real property so acquired."

[*Act Under 1958 Amendment*]

Acting under the amendment provided by Chapter 646 of the Laws of 1958 of the State of New York as above indicated, the Power Authority of the State of New York obtained, after a long and at times bitter contest before the Congress of the United States, the status of a licensee of the Federal Power Commission, an agency of the United States Congress, to which the latter had delegated its authority concerning water power and hydroelectric development. While this debate in the Congress of the United States was proceeding as to what agency, if any, would be the representative of the United States following its treaty with the Dominion of Canada in 1950, the Dominion of Canada proceeded immediately, and has created, and is now utilizing, a very modern and most valuable hydroelectric power system, the turbines of which generate power and have for some years past; parenthetically, following the destruction of the Niagara Mohawk plant (formerly the Niagara Power Company) on the American shore of the Niagara River, negotiations were entered into resulting in sale by the Dominion of Canada to the United States of power from this very new equipment. Thus, in the final legislation by the Congress, empowering the Power Authority of New York to proceed as a licensee of the Federal Power Commission; and in the State of New York legislation of 1958, germane to the issue of power; time was shown to be most important.

1. Treaty between the United States and the Six Nations concluded at Fort Stanwix in 1784 and proclaimed October 22, 1784. 7 Stat. 15.
2. Treaty between the United States and the Six Nations concluded at Canandaigua in 1794 and proclaimed January 21, 1795. 7 Stat. 44.

The plaintiff claims that the Power Authority in its attempt to occupy lands of the plaintiff, is offending federal treaties and statutes and that the defendants have not requested, nor has the Congress of the United States granted, permission to acquire lands belonging to plaintiff. The plaintiff further alleges that the 1,300 acres of land within the Tuscarora Reservation which defendants have purported to appropriate is of a unique character to plaintiff; in that it has been occupied by the Tuscarora Nation for over 150 years; and is land upon which they hope and intend to live in the future. Plaintiff further alleges that in the event that an area of the Reservation is taken, it cannot acquire by purchase similar contiguous land by using the proceeds from the lands taken "since any newly acquired lands would not be part of plaintiff's community and would be alien to plaintiff's customs, traditions and history."

[*Novel Argument*]

This is a novel argument in view of the fact that the 1,300 acres was purchased by the antecedents of those constituting the Tribe of Tuscarora Indians with moneys obtained from the sale of lands originally owned by this Tribe in North Carolina. The plaintiff further contends that the unique character of the land on the reservation is in sharp contrast to all alternative land available to the defendants outside the reservation. This is of no avail, as many cases have determined this to be a legislative and not a judicial question.

A great deal of historical and legal material respecting Indian lands generally, and the land of this plaintiff in particular, has been submitted by the parties. The reservation of this plaintiff appears to be unique among Indian lands in New York. The records indicate that a few Tuscaroras settled at or near the present reservation as early as 1780,[2a] but the tribe does not appear to have acquired legal title to the present reservation lands until some 20 to 30 years later, between 1800 and 1810. In addition, none of plaintiff's land was ceded or allotted to it either by the United States or the State of New York. The land was acquired in three parcels, to wit: one parcel acquired by deed from the Seneca Nation;[3] a second parcel acquired by grant from the Holland Land Co.; and the third parcel acquired by purchase from the Holland Land Co.[4] It is from this third parcel of 4,329 acres that defendant Power Authority wishes to take approximately 1,300 acres of land to construct a reservoir. There is no dispute among the parties concerning the way in which plaintiff acquired the disputed tract.

Plaintiff claims the protection of the Treaties of Fort Stanwix, signed October 22, 1784, and the Pickering Treaty, signed November 11, 1794. In these treaties, the United States guaranteed the Six Nations peaceful possession of the land upon which they were settled. While these guarantees might conceiveably apply to parts of parcel one or two, since some Tuscaroras appear to have settled therein between 1780 and 1795 even though title was not acquired until after 1800, they cannot apply to tract three, since the tribe did not settle therein until some time after 1804 and did not acquire title until 1809. It is not reasonable to interpret either treaty, in the absence of specific language so providing, to apply the guarantees contained therein to after-acquired lands. While such an interpretation might reasonably be made where the United States had ceded or allotted the after-acquired lands to plaintiff, such a result could never obtain where the after-acquired lands were purchased by plaintiff. In the latter eventuality, the only limit on the size of plaintiff's reservation would be the extent of its ability to purchase additional land. Certainly, it is not reasonable to assume that any of the parties to the treaties relied on by plaintiff had this result in mind.

[*Problem of Interest*]

The character of plaintiff's interest in the disputed land, and the location and control of the fee in that land, raises a two pronged problem. The first concerns the history of the specific fee involved, and the second, as mentioned previously, concerns the character of the fee in Indian lands generally.

The area in which plaintiff's land is located,

2a. Turner, The Pioneer History of the Holland Purchase of Western New York (Buffalo: Geo. H. Derby & Co., 1849), pp. 182-3.

3. Deed of Conveyance of 640 acres from Seneca Indians to Tuscarora Indians dated March 30, 1808, recorded in Liber 151, Pages 168-169, Niagara County Clerk's Office, Lockport, New York.

4. Deed of Conveyance of 4,329 acres from Henry Dearborn, Secretary of the War Department to Tuscarora Indians dated January 2, 1809, recorded in Liber A, Page 5, Niagara County Clerk's Office, Lockport, New York.

originally came under the dominion of the British Crown. The area was granted to the colony of Massachusetts under a charter issued by King Charles I.[5] Apparently, the same area was granted to the colony of New York under a charter issued by King Charles II.[6] Following the signing of the peace treaty between the United States and Great Britain, which terminated the Revolutionary War, a dispute arose between the newly independent states of New York and Massachusetts as to ownership and control of the area, including plaintiff's reservation. The dispute was settled by the so-called "Hartford Compact of 1786",[7] by which the two states agreed that New York would have governmental control over what is now Western New York. The parties agreed inter alia to the drawing of a line running north-south from Lake Ontario along the westerly shore of Seneca Lake to the present New York-Pennsylvania border. East of this line, New York was recognized as having the pre-emption right in the land. West of this line, the same right was vested in Massachusetts. In 1791 and 1792, Massachusetts, pursuant to the Hartford Compact, sold to Robert Morris all of its right, title and interest, including "the right of pre-emption of the soil from the native Indians", to the area west of a line running generally north-south from Lake Ontario through Geneseo to the New York-Pennsylvania border.[8] Morris then conveyed all of his right, title and interest in these lands to the Holland Land Company.[9] The deeds involved in effect required Morris to extinguish the Indian right of occupancy in the lands concerned, as a result of his covenant to remove all encumbrances. Pursuant to this covenant in 1797, Robert Morris entered into an agreement at Geneseo, the so-called "Treaty of Big Tree",[10] at which the Seneca Nation transferred all of its right, title and interest to Morris for a valuable consideration. The agreement specifically reserved ten tracts of land to the Indians, not including any part of plaintiff's reservation. Some question has been raised as to whether or not the Seneca grant was left out of the treaty by inadvertence, as in the case of the Oil Springs Reservation, so that original title remained in the Seneca Nation.[11] It should be noted that a United States Commissioner, one Jeremiah Wadsworth, was present at the making of the agreement, as a result of which the United States appears to have acquiesced to the agreement. As a result of the treaty of "Big Tree", it appears that the deed of the Seneca Nation to the Tuscarora of 640 acres in 1808 was a nullity in that the Senecas had nothing to convey. The transfer was never objected to by the Holland Land Company, its successors or assigns. It might be noted that, in correspondence between Joseph Ellicott and Theop. Cazenove, both officers of the Holland Land Company, an intention was expressed to confirm the Seneca grant, but to reserve to the Holland Land Company the pre-emptive right.[12] No formal action was taken in this regard until the company's conveyance in 1810 to David Ogden.

[*Right Extinguished*]

As a result of the above, assuming the Seneca Nation possessed the right of original Indian occupancy, and no reason appears for assuming that the truth is otherwise, the original right of

5. The Charter of the Colony of Massachusetts Bay in New England, 1628-9 (N.Y.Leg.Doc: No. 51 1889, pp. 94-100).
6. Grant from the King of England to the Duke of York, dated March 12, 1664 (N.Y.Leg.Doc. No. 51, 1889, pp. 100-104).
7. Hartford Compact between New York and Massachusetts concluded December 16, 1786, recorded in Liber 1, pages 270-280 of Miscellaneous Records in the Cattaraugus County Clerk's Office, Little Valley, New York (N.Y.Leg.Doc. No. 51, 1889, pp. 105-111).
8. Deed of Conveyance from the State of Massachusetts to Robert Morris dated May 11, 1791 (N.Y. Leg.Doc. No. 51, 1889, pp. 112-114).
   Release and Conveyance by the State of Massachusetts to Robert Morris dated June 20, 1792 (N.Y.Leg.Doc. No. 51, 1889, pp. 115-116).
9. Deed of Conveyance from Robert Morris to Herman LeRoy and John Lincklaen, agents for the "Holland Land Company", dated December 24, 1792 (N.Y. Leg.Doc. No. 51, 1889, pp. 117-120).
   Deed of Conveyance from Robert Morris to Herman LeRoy, John Linklaen and Gerrit Boon, agents for the "Holland Land Company", dated February 27, 1793 (N.Y.Leg.Doc. No. 51, 1889, pp. 121-123).
   Deed of Conveyance from Robert Morris to Herman LeRoy, William Bayard and Matthew Clarkson, agents for the "Holland Land Company", dated July 20, 1793 (N.Y.Leg.Doc. No. 51, 1889, pp. 124-127).
   Deed of Conveyance from Robert Morris to Herman LeRoy, John Linklaen and Gerrit Boon, agents for the "Holland Land Company", dated July 20, 1793 (N.Y.Leg.Doc. No. 51, 1889, pp. 128-130).
10. Agreement concluded between Robert Morris and the Seneca Indians at Big Tree (Geneseo, New York) September 15, 1797 (N.Y.Leg.Doc. No. 51, 1889, pp. 131-134).
11. Royce, Indian Land Cessions, 18th Annual Report of the Bureau of American Ethnology, Part 2 (Washington: Government Printing Office, 1899), p. 773.
12. Letter from Theophilius Cazenove to Joseph Ellicott dated May 10, 1798 (32 Buffalo Historical Society Publication, pp. 21-30).

Indian occupancy and the pre-emptive right in the lands now occupied by plaintiff were actually extinguished by the treaty of "Big Tree". Some question might be raised as to whether or not this is so with regard to the Seneca grant on a formal basis, in view of the 1810 conveyance by the Holland Land Company of its pre-emptive rights in 1,920 acres in the Tuscarora Reservation to David Ogden,[13] this acreage being equivalent to the Seneca grant and the Holland grant to the Tuscarora Reservation combined. This interest was later conveyed by the Ogden Land Company to others [14] in 1821, and presumably resides at present in the heirs or assigns of the said grantees. There does not appear to have been a conveyance of the pre-emptive right as such in the Tuscarora purchase subsequent to the treaty of "Big Tree." In any event, the present title to all of the land of plaintiff was acquired from grantees of the sovereign who possessed the pre-emptive right, and who had previously extinguished the original right of Indian occupancy. This right, once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right. The obvious policy of the sovereign was to extinguish the original Indian title to all but reserved Indian lands. Original Indian title was viewed as an encumbrance on land, rather than a legitimate general interest, since it could be held only by the original Indian tribes and it was the intention of the sovereign that Indians should be confined to specific tracts, and the state generally opened to white settlement. In view of this policy, it cannot be argued that original Indian title can in any manner be revived once it has been extinguished. Plaintiff here, of course, historically did not possess original Indian title in the lands which they now occupy. They hold title by deed and not by original right of Indian occupancy.

The foregoing is as brief a sketch as possible of the title to the specific land at issue. However, to determine exactly what interest the plaintiff acquired when it acquired title, we must look to the general law regarding Indian lands. The basic statement of the legal character of such lands is to be found in the landmark opinion of Chief Justice John Marshall in Johnson v. McIntosh, 8 Wheat. 542, 21 U.S. 542 at page 583, 5 L.Ed. 681. The effect of this decision, which has been uniformly followed since its issuance in 1823, is to confirm in the Indian tribes merely a "right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." In the earlier case of Fletcher v. Peck, 6 Cranch 87, 10 U.S. 87, 3 L.Ed. 162, Chief Justice Marshall said, with respect to lands within another of the thirteen colonies, to wit, Georgia, that the question whether vacant lands within the United States were joint property or belonged to the separate states had been compromised; that since the vacant land at issue therein was within the State of Georgia, that state had the power to grant it; and finally, that the nature of Indian title was such as not to be inconsistent with seizin in fee on the part of the state.

[*Fee Title in the State*]

The reasoning found in the Johnson and Fletcher cases forms the basis for the view that in the thirteen original colonies the fee to all land within the state passed directly from the Crown to the sovereign state following the revolution; that the United States never had title to such lands, and that as the Indians had at best a mere right of occupancy, the fee to their lands resided in the state. This status is in contrast to that of all lands, and particularly Indian lands, outside the original thirteen colonies, which were federally owned before being divided into sovereign states. This view is succinctly set forth in Seneca Nation of Indians v. Appleby, 127 App.Div. 770, 112 N.Y.S. 177 at pages 188-189, reversed on other grounds at 196 N.Y. 318, 89 N.E. 835; in Seneca Nation of Indians v. Christie, 126 N.Y. 122, 27 N.E. 275; Jones Cut Stone v. State, 7 Misc.2d 1048, 166 N.Y.S.2d 742, and in several reports and opinions of Congressional Committees and Attorneys General. See a report on the background and status of the New York Indians submitted to the Speaker of the House of Representatives by the Department of the Interior on January 4, 1954.[15] See also Dixon v.

13. Deed of Conveyance from Holland Land Company to David A. Ogden, dated September 12, 1810, recorded at No. 1 of Deeds, page 68, Erie County Clerk's Office, Buffalo, New York.

14. Deed of Conveyance from David Ogden to Robert Troup and others dated February 21, 1821, recorded in Liber One of Deeds at pp. 102-110, Cattarugus County Clerk's Office, Little Valley, New York (N.Y.Leg.Doc. No. 51, 1889, pp. 172-181).

15. Report entitled "Background Data on Indians of New York" transmitted by Assistant Secretary of the Interior Orme Lewis to the Speaker of the House of Representatives, January 4, 1954. Plaintiff's Exhibit 7.

State, 4 Misc.2d 76, 155 N.Y.S.2d 723 and St. Regis Tribe of Mohawk Indians v. State, 4 Misc.2d 110, 158 N.Y.S.2d 540, reversed on other grounds at 5 A.D.2d 117, 168 N.Y.S.2d 894. Collateral support for this view is also found in the rules of law, basic in New York since the time of its inception, that original and ultimate property to all lands within the jurisdiction of the state resides in the people thereof (reflected today in New York Constitution, Art. I, Sec. 10); and that no sale of Indian lands may be made without legislative consent (N.Y.Const. Art. I, Sec. 13). When Section 1007, Public Authorities Law of New York State was amended, a statement from the floor during the debate contained a direct quote showing knowledge by the Legislature that plaintiff's lands were involved. In view of this, the Legislature must be presumed to have consented to the taking. Even if this were not so, there appears to be authority for such a taking, irrespective of legislative approval. See St. Regis Tribe of Mohawk Indians v. State, 5 A.D.2d 117, 168 N.Y.S.2d 894, at page 898-899.

[*Grantees Limited*]

As a result of the character of Indian title in New York, the provision of the Pickering Treaty which, if applicable, would apparently limit grantees of the Six Nations to "the people of the United States" (Art. 3), could not refer to the Federal Government only, since the Federal Government never possessed the fee or the pre-emptive right in New York Indian lands. Indeed, the Supreme Court, in The New York Indians, 5 Wall. 761, 72 U.S. 761, 18 L.Ed. 708, interpreted that treaty as meaning that the Indians could sell only to the party possessed of the right of pre-emption, although this had to be done with the consent of the government. The treaty of "Big Tree", which extinguished the Indians' original right to possession in the land in issue, was acquiesced in by the United States. For this reason, that treaty also complied with the requirements of the first "Indian Non-Intercourse Act"[16] (1 Stat. 137, 138), and also with the second "Non-Intercourse Act"[17] (1 Stat. 329, 330). Furthermore, the character of the title to Indian lands in New York explains the holding in Seneca Nation of Indians v. Christie, supra, that New York had the power to make treaties with New York Indians for the purchase of their lands; and the holding in United States v. Franklin County, D.C., 50 F.Supp. 152, that the absence of a United States Commissioner at the making of such a treaty would not invalidate it. The character of that title also affords the basis for the holding that Indians in New York are wards of the State, and the fee to their lands resides in the State, as found in Seneca Nation of Indians v. Christie, supra; Dixon v. State, supra, and other decisions. In People of State of New York ex rel. Ray v. Martin, 1946, 326 U.S. 496, at page 499, 66 S.Ct. 307, at page 308, 90 L.Ed. 261, the most recent decision of the Supreme Court on the subject of the peculiar status of the New York Indian, it was held that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause of the Constitution with the power to regulate interstate commerce, is of a similar nature, the court saying, "In the absence of a limiting treaty obligation or Congressional enactment, each state had a right to exercise jurisdiction over Indian reservations within its boundaries." Finally, there are innumerable examples of the extinguishment of Indian title in New York, some involving plaintiff's land, in which the United States took no part.[18] The state has, for example, long exercised the power of eminent domain over Indian lands for highway and related projects. Wadsworth v. Buffalo Hydraulic Ass'n, 15 Barb. 83.

[*Disposition of Rights Proper*]

As a result of the foregoing, it is clear that the disposition of the pre-emptive rights by Massachusetts to Robert Morris was proper; that Morris' extinguishment of the original Indian right to possession conformed with applicable Federal law, that plaintiff does not now, and never did, possess that right in the lands in dispute. Whatever interest the United States has in the New York Indians is directed not to Indian lands as such, but to something more vague and general, such as their general welfare.[19] In any event, it is not directed to the land in dispute,

16. Indian Non-Intercourse Act, July 22, 1790. 1 Stat. 137, 138.
17. Indian Non-Intercourse Act, March 1, 1793. 1 Stat. 329, 330.
18. Agreement between New York Telephone Company and Niagara Mohawk Power Corporation and Chief Harry Patterson, March 1, 1951. Defendant Power Authority Appendix, pp. 122a-123a.
Agreement between Niagara Mohawk Power Corporation and Harry Patterson, March 17, 1958. Defendant Power Authority Appendix, pp. 124a-125a.
19. Letter from Fred G. Aandahl, Assistant Secretary of the Interior to Henry Patterson, member of Council

which was given reservation status by the New York Legislature, not by the United States.

The character of the interest of the United States effectively refutes the contention by plaintiff's attorney that since the Bureau of Indian Affairs had to approve his contract with plaintiff,[20] that the Congress therefore intended to retain control over plaintiff's land. Control of the specific matter of attorneys' contracts is not at all consistent with the absence of exercise of federal control over New York Indian lands.

Plaintiff's land is unique among Indian lands in New York, having been purchased, rather than granted or ceded by the government. Plaintiff holds record title to the lands in dispute, but the effect of that title has not been determined. The act of the Legislature in 1821, after several petitions by plaintiff, permitted plaintiff to hold its land nationally and extended to it a tax-free status, and other protections constituting reservation status. It may be claimed that this had the effect of vesting the fee in the state in return for the favored status granted. Research reveals no previous decisions on either the ability of an Indian tribe to hold land in fee, if purchased, or the effect of giving purchased land reservation status. But that question need not be dealt with here. For it is clear that if the fee is in the state, it may be taken by the state. But if the fee is not in the state, then it is privately held. If privately held, the fee is subject to the power of eminent domain and just compensation for the taking, unless it falls within a category excluded by Federal law or the State Constitution. The plaintiff urges particularly Section 177 and Section 233 of Title 25 U.S.C.A., which was an amendment to the Indian Law becoming effective in September, 1952, and which the plaintiff claims excludes the alienation of lands in reservations in New York State. The Public Authorities Law, Section 1007 of the State of New York, contemplates a right of eminent domain in the sovereign state as granted in Section 21 of the Federal Power Act, 16 U.S.C.A. Section 814. Moreover, the acquisition of property as taken by the State Power Authority is the method outlined in the State Highway Law of New York, Section 30. See, Lake Ontario Land Development etc. v. Federal Power Comm., 93 U.S. App.D.C. 351, 212 F.2d 227. Under the Federal Power Act, as held in State of Missouri ex rel. and to Use of Camden County Mo. v. Union Electric Light and Power Co., D.C., 42 F.2d 692, necessity for taking property under power of eminent domain is exclusively within the power of Congress to determine by direct enactment or delegation of its power to an office or board. Under this section, a licensee, such as the Power Authority of the State of New York, has a general power to take. See Burnett v. Central Nebraska, etc., 147 Neb. 458, 23 N.W.2d 661; United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336.

[*No Congressional Requirement*]

There is no constitutional requirement that the appropriation now involved be specifically authorized by an Act of Congress. The Federal law urged as applicable by plaintiff has been examined above and found to present no bar to the exercise of eminent domain. The State Constitution has been examined, and, far from presenting a bar to public condemnation, discloses an intent by the state to exercise exclusive control over Indian lands in New York.

In addition, Section 233 of Title 25 U.S.C.A. in its reference to the alienation of Indian lands in New York meant merely that the general law of New York relating to the alienation of land should not, as a result of Sec. 233, be construed to apply to Indian lands, but rather that the peculiar nature of such lands (i. e. a mere possessory right in the Indian Nations), should continue to be recognized. If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to

---

of Tuscarora Nation and owner by allotment of 500 acres of land declining under date of November 1, 1957 to aid the Tuscarora Nation in opposing the Authority's application then pending before the Federal Power Commission.

Order of Federal Power Commission—"As your reservation lands are under State jurisdiction, this department is not in a position to present your case for you." This sentence was quoted by the Federal Power Commission in its order issued March 21, 1958, which denied the application of the Tuscarora Nation for a rehearing of its objection to the licensing of the Niagara project because the reservoir is to be located on part of its land.

Plaintiff's exhibit 10; Power Authority Appendix p. 149a. See also Report of Department of Interior, Plaintiff's exhibit 7 supra, and plaintiff's exhibits 9A, 9B and 9C.

20. Letter from Assistant Commissioner of the Bureau of Indian Affairs, Department of the Interior, to Messrs. Strasser, Spiegelberg, Fried and Frank, Attorneys for Plaintiff, dated May 12, 1958. Plaintiff's exhibit No. 8A.

Notice of approval of contract entered into by the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Fried and Frank, authorized by the Deputy Commissioner of the Bureau of Indian Affairs, Department of the Interior, dated April 17, 1958. Plaintiff's exhibit No. 8B.

assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incongruous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress. The plaintiff alleges that further acts on the part of the Power Authority, pursuant to the statutes of the State of New York, would, except for the intervention of this court, "interfere with the effective discharge of vital functions of the Federal Government, will frustrate the powers conferred by the Constitution upon the Congress of the United States, and are unlawful and will cause irreparable damage to plaintiff, for which it has no adequate remedy at law."

(1) *Jurisdiction*—While this court does not feel that a wholly federal question is raised here, nor that the usual jurisdictional limits of this court are met by the parties herein, this court has not been able to find any authorization for an Indian Tribe or Nation to institute a suit in state court seeking the relief sought here. Solely because plaintiff would be without the right to seek its present remedy if it were allowed to maintain this action, this court assumes jurisdiction of the action, and proceeds to a consideration on the merits. Sec. 5 N.Y. Indian Law; King v. Warner, Sup., 137 N.Y.S.2d 568; Bailey v. Miller, 208 Misc. 26, 143 N.Y.S.2d 122.

(2) *Three Judge Court*—Regardless of the pleadings and memoranda of the parties as to whether a constitutional question is presented, it is for the court to determine whether or not a claim of unconstitutionality is a substantial one. Patterson v. Hardin, D.C., 145 F. Supp. 299. The view of this court is that the question presented is merely one of construction of a state statute as applied to this plaintiff. Having already determined that no substantial federal question is technically presented, and for the reasons set forth below under point 3, this court concludes that no substantial constitutional question is raised, and that defendant Power Authority's motion for a three judge court must be denied. See Wreiole v. Waterfront Commission of New York Harbor, D.C.N.Y.1955, 132 F.Supp. 166; Howard v. Ladner, D.C.Miss.1953, 116 F.Supp. 783, remanded for dismissal White v. Howard, 347 U.S. 910, 74 S.Ct. 476, 98 L.Ed. 1067.

(3) *Propriety of Taking*—As a result of the above analysis of the history and character of plaintiff's interest in the Tuscarora Reservation, there is no adequate reason why the taking by defendants of the land in dispute should not be confirmed. The motion for a permanent injunction must be, and is, denied. The temporary restraining order hereinbefore granted by Palmieri, D. J., and modified by Sugarman, D. J., each in the Southern District of New York, is dissolved. Plaintiff's motion that the temporary restraining order be continued pending appeal to the Circuit Court is denied. Plaintiff's motion that the affidavit of Henry S. Manley be stricken as an affidavit and considered by the court as an additional brief on behalf of defendants is granted.

(4) *As to Just Compensation*—This court adopts the reasoning of Lambaise, J., in St. Regis Tribe of Mohawk Indians v. State, 4 Misc.2d 110, 158 N.Y.S.2d 540 548, wherein the court held that although an Indian tribe may not bring suit in New York except by statutory authority, Section 30 of the Highway Law "would be clearly unconstitutional where it makes no provision for compensation to those whose private property is to be taken for public use. While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. Litchfield v. Bond, 186 N.Y. 66, 74, 78 N.E. 719, 222; Sweet v. Rechel, 159 U.S. 380, 406, 16 S.Ct. 43, 51, 40 L.Ed. 188." Neither Sec. 30 of the Highway Law nor Sec. 1007 of the Public Authorities Law set forth any restriction or limitation "upon the legal status of the owner from whom the property is taken, and implicit therefor, if not explicit, therein, is the right of an owner to have his day in court to prove his title, or interest and to establish his damages." Though St. Regis Tribe of Mohawk Indians v. State, supra, was reversed by the Appellate Division, Third Department, at 5 A.D.2d 117, 168 N.Y.S.2d 894, the reversal appears to have been on other grounds. It is therefore the holding of this court that there is statutory authority for plaintiff herein to bring suit in the New York Court of Claims to determine the amount of just compensation for the taking herein, and that the

Court of Claims is the proper forum for determining the question of compensation. The constitutional requirement of just compensation is met. A careful reading of the statute law, and the interpretation thereof by case law above cited, indicate that plaintiff has a right of action in the courts of the State of New York. Therefore, this court declines to accept jurisdiction of the question of compensation, or to impinge upon the jurisdiction of the New York courts, and leaves plaintiff to its state remedies in this respect. The complaint in this action is dismissed without costs. The above constitutes the findings of fact, conclusions of law and judgment of this court. The judgment is effective immediately. So ordered.

PUBLIC ACCOMMODATIONS
Restaurants—District of Columbia

Leopoldine M. TYNES, Appellant v. Pandora P. GOGOS, Appellee.

Municipal Court of Appeals for the District of Columbia, August 22, 1958, 144 A.2d 412.

SUMMARY: A white woman brought a civil action for damages in federal district court in the District of Columbia against a restaurant proprietor, alleging that she had suffered humiliation and other emotional distress as a result of having been barred from dancing with her husband, a Negro, in violation of District ordinances. The suit was transferred to the District Municipal Court, which dismissed the action on the ground that the ordinances in question do not give rise to a civil cause of action to a person in plaintiff's class. 3 Race Rel. L. Rep. 37 (1958). On appeal, the District Municipal Court of Appeals affirmed, ruling that the ordinances or police regulations involved are penal in character and do not support a civil action for damages. The court also rejected plaintiff's contention that she was entitled to recover, apart from the ordinances, for a violation of the duties imposed by the common law upon defendant, as a restaurant owner, toward guests. The court interpreted the common law in this regard as applying only to innkeepers.

Before ROVER, Chief Judge, and HOOD and QUINN, Associate Judges.

ROVER, Chief Judge.

The right to maintain a civil action for damages predicated on the so-called "anti-discrimination laws" effective in the District is in issue on this appeal. The matter is before us from an order of the trial judge granting a motion to dismiss appellant's complaint for failure to state a claim upon which relief can be granted.

The complaint filed in this case alleged that appellant, a white woman, accompained by her husband, a member of the Negro race, entered a restaurant and dance hall owned and operated by appellee in this city. They were admitted into the restaurant, ordered, and were served refreshment. Sometime in the course of the evening appellant and her husband went to the area of the restaurant reserved for dancing and began to dance when, according to the complaint, an employee acting on appellee's instructions informed them that "mixed dancing" was not permitted and ordered them to stop. In addition to these allegations the complaint states that when appellant attempted to protest the order in a peaceful manner, insulting and abusive remarks were made to her in the presence of other patrons. For humiliation, embarrassment, anguish, and anxiety, appellant sought compensatory and punitive damages.

[*Assault Allegation Omitted*]

Although the complaint as orginally drawn included an allegation of assault, this was deleted by amendment in the trial court prior to the hearing on appellee's motion, and counsel for appellant in oral argument before this court has assured us that assault is not alleged in the action.

Appellant's claim is in main based on the violation of two Acts of the Legislative Assembly

passed in 1872[1] and 1873[2] and an Act of the Corporation of the City of Washington, approved June 10, 1869, as enlarged and amended in 1870.[3] The pertinent portions of these Acts are set forth in the margin.[4]

The validity of these Acts is not in dispute. In District of Columbia v. John R. Thompson Co.,[5] the Supreme Court upheld the validity of the 1873 Act and left open on remand to the United States Court of Appeals for the District of Columbia the status of the 1872 Act. That court ruled "with respect to restaurants, the 1873 Act repealed that of 1872 * * *."[6] Two years later this court affirmed a conviction under the 1869 Act as amended. Central Amusement Company v. District of Columbia, D.C.Mun. App. 1956, 121 A.2d 865.

The applicability, however, of these Acts to the facts as pleaded in this case raises some doubts. The Act of 1872 does little more than require that equal service be accorded patrons without regard to race or color, a matter not in issue here. Its unrepealed provisions apply only to hotels, ice-cream saloons, soda fountains, barber shops, and bathing houses, all of which appear to be totally dissimilar from appellee's establishment as described in the complaint. The Act of 1873 speaks in terms of equal treatment and of *accommodating any well-behaved*

1. Act of June 20, 1872, D.C.Laws 1871-72, pt. IV, c. LI, §§ 1-3, Comp.St.1894, c. 16, § 148 et seq.
2. Act of June 26, 1873, D.C.Laws 1873, pt. II, c. XLVI, §§ 1-5, Comp.St.1894, c. 16, § 151 et seq.
3. Act of June 10, 1869, ch. 36, p. 22, Corp.Laws of Wash., 66th Council, §§ 1, 2, as enlarged and amended by the Act of March 7, 1870, ch. 42, p. 22, Corp. Laws of Wash., 67th Council, §§ 1-5.
4. Section 3 of the 1872 Act provides: "Any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, * * * shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Assessor [Register] or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

   Sections 1 and 2 of the 1873 Act provide for the posting of prices by restaurants and drinking places. Section 3 provides that the sale of food and drink shall be at the usual or common prices and service to any respectable and well-behaved person shall be rendered in the same room or rooms where any other such person would be served.

   Section 4 of this Act reads: "If the proprietor or proprietors, keeper or keepers, of any place or establishment * * shall refuse or neglect, in person or by his, her, or their employe or agent, directly or indirectly, *to accommodate any well-behaved and respectable person* * * * or shall at any time or in any way or manner, or under any circumstances, or for any reason cause, or pretext, *fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated* at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: Provided, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law." (Emphasis supplied.)

   The Act of 1869 made it a punishable offense for any person holding a license for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment, or for conducting a place of public amusement to make any distinction on account of race or color in regard to the admission of persons. A fine of not less than ten dollars nor more than twenty dollars was established for the violation of this provision.

   This Act was enlarged by the Act of 1870. Section 1 reads: "That from and after the passage of this act it shall not be lawful for the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, to *refuse to receive, admit, entertain, and supply* any quiet and orderly person or persons, or to exclude any person or persons on account of race or color." (Emphasis supplied.)

   In addition, § 3 of the Act of 1870 amended the Act of 1869 by increasing the fine to a sum of not less than fifty dollars for each violation.

   Section 4 provides: "That after the final conviction of any party for the violation of any of the provisions of this act, or of that of June 10, 1869, * * * *and the recovery of the fine, a sum equal in amount to one-half of such fine shall be paid,* * * * *to the party who may have been the informer* in any such case." (Emphasis supplied.)
5. D.C.Mun.App.1951, 81 A.2d 249, reversed in part, 1953, 92 U.S.App.D.C. 34, 203 F.2d 579, reversed, 1953, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480. For discussions of this case, see Franchino, The Constitutionality of Home Rule and National Representation for the District of Columbia, Part I, 46 Geo.L.J. 207, 243-53 (1957-58); Indritz, Post Civil War Ordinances Prohibiting Racial Discrimination in the District of Columbia, 42 Geo.L.J. 179, 181 et seq. (1954). See also Notes, 42 Geo.L.J. 132 (1953); 67 Harv.L.Rev. 107 (1953); 28 N.Y.U.L. Rev. 1316 (1953).
6. 1954, 93 U.S.App.D.C. 373, 214 F.2d 210, 211.

and respectable person. The 1870 Act, which broadened the scope of its 1869 predecessor, made it unlawful to refuse to admit or *entertain* any quiet or orderly person because of race or color. While the latter two Acts would appear to have greater relevancy, neither party on this appeal has specifically argued the construction or applicability of the terms employed in the Acts in relation to the activity prohibited by appellee. Appellant's contention on this is only that the actions of appellee were such as to constitute discrimination on the basis of race or color. We need not resolve this conflict, for assuming without so deciding that the facts of this case are within these Acts, we hold as to the paramount issue raised on this appeal (1) that the Acts involved here are municipal ordinances or police regulations, penal in character, and (2) that they do not give rise to a civil action for damages.

[*Construing Organic Act*]

Construing the Organic Act of February 21, 1871, 16 Stat. 419, which created the government of the District of Columbia, the Supreme Court, in the Thompson case characterized the District's early government as a "territorial government." 346 U.S. at page 105, 73 S.Ct. at page 1010.[7] The grant of legislative power to the District's Legislative Assembly was said by the Court to be substantially identical with the grant of legislative power to the territories. Subject to the right of Congress to revise, alter, and revoke, the lawmaking authority delegated to the Legislative Assembly extended to all rightful subjects of legislation and "was as broad as the police power of a state" so as to include laws prohibiting discrimination on the basis of race. 346 U.S. at page 110, 73 S.Ct. at page 1013. But if the Legislative Assembly, during its brief existence,[8] was empowered to enact matters of general legislation, it also possessed the power to prescribe local regulations relating purely to municipal affairs.[9] Thus the Assembly was something of a legislative anomaly possessing dichotomous powers.

Having categorized the authority vested in the Legislative Assembly, the Supreme Court in the Thompson case then classified the Acts of 1872 and 1873:

> "It is our view that these anti-discrimination laws governing restaurants in the District are 'police regulations' and acts 'relating to municipal affairs' * * *."[10]

And again at 346 U.S. at page 113, 73 S.Ct. at page 1014, the Court said:

> "* * * Regulation of public eating and drinking establishments in the District has been delegated by Congress to the municipal government from the very beginning. [Citing authorities.] In terms of the history of the District of Columbia there is indeed no subject of legislation more firmly identified with local affairs than the regulation of restaurants."

Similarly, this court in Central Amusement Company v. District of Columbia, D.C.Mun.App., 121 A.2d 865, at page 866, held the Act of 1869 as enacted and amended by the Board of Common Council to be a "regulatory measure in the nature of a police regulation."

[*Designed To End Discrimination*]

Each of the Acts in question was designed to end discriminatory practices in the District through the regulation of restaurants and each therefore prescribed within its framework a penal sanction. Section 3 of the 1872 Act established a fine of $100 and forfeiture of the offender's license for its violation. The Act of 1873 fixed a similar penalty (§ 4) and provided in detail for enforcement by information in the Police Court subject to appeal to the Criminal Court. The 1869 Act as amended and enlarged exacted a fine of $50, one-half of which was to

7. See also Eckloff v. District of Columbia, 1890, 135 U.S. 240, 241, 10 S.Ct. 752, 34 L.Ed. 120. A similar comparison was made in the earlier case of Grant v. Cooke, 1871, 7 D.C. 165.

8. The Legislative Assembly was abolished by the Temporary Organic Act of June 20, 1874, 18 Stat. 116, which provided for a temporary government of three Commissioners appointed by the President. By the Organic Act of June 11, 1878, 20 Stat. 102, this became the permanent form of government in the District and legislative power was withdrawn from the municipal government.

9. Numerous earlier decisions had upheld directly or by implication the Assembly's authority to enact local or municipal laws. See Stoutenburgh v. Hennick, 1889, 129 U.S. 141, 9 S.Ct. 256, 32 L.Ed. 637; Johnson v. District of Columbia, 1908, 30 App. D.C. 520; Smith v. Olcott, 1901, 19 App.D.C. 61; District of Columbia v. Waggaman, 1885, 4 Mackey 328, 15 D.C. 328; Cooper v. District of Columbia, 1880, 1 MacArthur & Mackey 250, 11 D.C. 250; Roach v. Van Riswick, 1879, 1 MacArthur & Mackey 171, 11 D.C. 171.

10. 346 U.S. at page 112, 73 S.Ct. at page 1014.

be paid the informer *upon recovery*. Clearly these Acts are penal in nature; none suggests or envisions a civil remedy.

Numerous authorities are cited by appellant to support the proposition that legislation while penal in form may be both penal and remedial in effect.[11] All of these cases are readily distinguishable in that they involve specific state Civil Rights Acts or congressional legislation. The Acts in issue here are not *statutes* but *municipal ordinances*.

The question then presented is whether a civil action for damages may be predicated on an ordinance or regulation. In 6 McQuillan. The Law of Municipal Corporations, § 22.01 (3d ed. 1949), it is stated:

> "The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves. * * * As applied to causes of action in tort the rule is also applicable not only theoretically put in full and practical effect; an ordinance cannot directly provide that one person owes a civil duty to another, the breach of which to the damage of the other gives him a cause of action. * * *"

Although we have found no case factually in point[12] and have been referred to none, this principle has found wide acceptance in cases of diverse factual circumstances. See Bain v. Ft. Smith Light & Traction Co., 1915, 116 Ark. 125, 172 S.W. 843, L.R.A. 1915D, 1021; City of Goshen v. Crary, 1877, 58 Ind. 268; City of Joplin v. Wheeler, 1913, 173 Mo.App. 590, 158 S.W. 924; Becker v. Schutte, 1900, 85 Mo.App. 57; Vandyke v. City of Cincinnati, 1857, 1 Disn. 532, 12 Ohio Dec. 778; Philadelphia & Reading R. Co. v. Ervin, 1879, 89 Pa. 71, 33 Am.Rep. 726; Kessler v. Mandel, 1945, 156 Pa.Super. 505, 40 A.2d 926; Heeney v. Sprague, 1877, 11 R.I. 456, 23 Am. Rep. 502; Stark v. First Nat. Stores, 1952, 117 Vt. 231, 88 A.2d 831; Shea v. Pilette, 1937, 108 Vt. 446, 189 A. 154, 109 A.L.R. 933. We think it applicable here. The Acts on which appellant relies are, in the words of Justice Douglas speaking for the Court in Thompson, "*regulatory* laws prescribing in terms of civil rights the duties of restaurant owners to members of the public." 346 U.S. at page 116, 73 S.Ct. at page 1016. The duties set forth in these Acts embrace not only equal service and accommodations but the posting of prices. For the breach of these duties criminal penalties are exclusively provided, and the rights conferred on the public through these regulatory measures are enforceable therefore solely by the municipality through its criminal processes. The annexation of civil liability would not only contravene the principle we adopt here but would supply an intent and a remedy not found in the Acts.

Apart from these Acts appellant contends the rights asserted here existed at common law. We know of no settled authority in the District which supports this view[13] and are of the belief that the duties imposed on restaurant owners by these Acts were, unlike those imposed on the innkeeper, unknown at common law in the District.[14] Although appellant has neither sought nor argued the possibility of relief on a theory of contract, on consideration we conclude that the facts as alleged here do not support a claim of this kind. Cf. Thomas v. Pick Hotels Corporation, 10 Cir., 1955, 224 F.2d 664. Accordingly the order of the trial court dismissing the complaint for failure to state a claim upon which relief can be granted is

Affirmed.

11. Fitzgerald v. Pan American World Airways, 2 Cir., 1956, 229 F.2d 499, involving the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq.; Amos v. Prom, Inc., D.C.N.D.Iowa 1954, 117 F.Supp. 615; Powell v. Utz, D.C.E.D.Wash. 1949, 87 F.Supp. 811; Bolden v. Grand Rapids Operating Corporation, 1927, 239 Mich. 318, 214 N.W. 241, 53 A.L.R. 183; Anderson v. Pantages Theater Co., 1921, 114 Wash. 24, 194 P.813. Contra: Agnew v. City of Compton, 9 Cir., 239 F.2d 226, certiorari denied 1957, 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; Mezullo v. Maletz, 1954, 331 Mass. 233, 118 N.E.2d 356.

12. But see Nance v. Mayflower Tavern, 1944, 106 Utah 517, 150 P.2d 773, where the court had before it a similar ordinance. However, in holding the ordinance void, the court did not reach the question raised here.

13. Appellant relies on *dictum* in Judge Cayton's opinion in Thompson, where he expressed his personal view that the Assembly, in passing these Acts, was not creating new rights, but by local regulation was assuring the observance of pre-existing rights of local citizens. 81 A.2d at page 251.

14. The common law distinction between restaurant owners and hotel-keepers has been described in several cases. See, e.g., John R. Thompson Co. v. District of Columbia, 1953, 92 U.S. App.D.C. 34, 43, 203 F.2d 579; Alpaugh v. Wolverton, 1946, 184 Va. 943, 36 S.E.2d 906, Nance v. Mayflower Tavern, supra, note 12.

TRIAL PROCEDURE
Evidence—Louisiana

Edgar LABAT and Clifton Alton Poret v. Hon. Maurice SIGLER, Warden of the Louisiana State Penitentiary.

United States District Court, Eastern District of Louisiana, May 27, 1958, 162 F. Supp. 574.

SUMMARY: Petitioners, Negroes, were convicted and sentenced to death by a Louisiana state court on a charge of raping a white female, and the Louisiana Supreme Court affirmed. The Supreme Court of the United States, after granting certiorari limited to an attack on the grand jury venire, also affirmed. *Michel v. Louisiana*, 350 U.S. 91, 76 S.Ct. 158, 1 Race Rel. L. Rep. 23 (1955). The condemned men then applied to the Louisiana Supreme Court for a writ of habeas corpus, alleging for the first time that they had been convicted on perjured testimony coerced by policemen, but the application was denied. The Supreme Court of the United States denied certiorari, remanding the cause to a federal district court in Louisiana, however, for further consideration in view of the exhaustion by petitioners of state remedies. *Poret v. Sigler*, 355 U.S. 60 (1957). The district court, after it had "in effect, retried the petitioners," discharged the writ. The court declared that "while it must be owned that the conviction of a Negro of rape of a white female in the state should be subjected to the severest scrutiny," it could not say that petitioners had been denied due process of law.

J. SKELLY WRIGHT, District Judge.

Petitioners, both Negroes, are condemned to die for the rape of a white female in the city of New Orleans. They were convicted by jury and their conviction was affirmed by the Supreme Court of Louisiana. State v. Labat, 226 La. 201, 75 So.2d 333. The Supreme Court of the United States also affirmed the conviction after granting a writ of certiorari limited to an attack on the grand jury venire. Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83. In this application for a writ of habeas corpus, petitioners contend that they were convicted on the perjured testimony of one Earl Howard, which perjury was coerced by the police. This issue was neither raised nor passed on during petitioners' original trial. However, the state remedy with respect to it has been exhausted by the submission of this issue via application for writ of habeas corpus to the Supreme Court of Louisiana, which application was denied. State of Louisiana ex rel. Poret and Labat v. Sigler, No. 43799, decided September 25, 1957. An application for writ of certiorari to the Supreme Court of the United States from this denial was also denied, but the cause was remanded to this court[1] for further consideration of the application for habeas corpus in view of the exhaustion by petitioners of state remedies. Poret v. Sigler, 355 U.S. 60, 879, 78 S.Ct. 144, 2 L.Ed.2d 107, 109.

[*Full Hearing*]

A full hearing, including the testimony of twenty-four witnesses and the introduction of several documents, was conducted by this court. The evidence shows that on the early morning of November 12, 1950, Earl Howard, a Negro, was on the corner of Thalia and South Galvez Streets in the city of New Orleans. He saw Robert Penedo and Helen Rajek, both white, knocking on the front door of the home of Miss Rajek's sister located on that corner. Miss Rajek's brother-in-law also operated a grocery at that location and Miss Rajek had seen Howard previously around the grocery store.

When no one in the home of Miss Rajek's sister and brother-in-law responded to their knocking, Penedo and Miss Rajek departed, proceeding out Thalia Street toward Broad Street. Shortly after they left, the petitioners, Poret and Labat, came to the corner of Thalia and South Galvez where they spoke to Howard. Poret and Labat then followed Penedo and Miss Rajek out Thalia Street. When Poret and Labat overtook Penedo and Miss Rajek, Labat jumped Penedo from behind while Poret seized Miss Rajek and took her off into an adjoining alley. Penedo broke free of Labat and ran back to Thalia and South Galvez where he called the police and returned with them to the scene of

1. This court had denied the application for writ of habeas corpus for failure to exhaust state remedies. 28 U.S.C. § 2254.

the crime. On seeing the police, Labat and Poret ran, leaving Miss Rajek in the alley where both had assaulted her, one holding her while the other had intercourse with her.

Miss Rajek and Penedo, both at the trial in the state court as well as in this court, identified Poret and Labat as their attackers. Howard testified in the state court that he had talked with Poret and Labat at the corner of Thalia and South Galvez at the time in question and last saw them following Penedo and Miss Rajek out Thalia Street. In this court Howard, in some parts of his testimony, reiterated what he had said in the state court, while in other parts, Howard indicated that he was not certain the two men he saw were Poret and Labat. In the interim between the trial in the state court and the hearing in this court, Howard had signed various statements prepared by different people stating that he committed perjury at the trial of Poret and Labat and that this perjury was coerced by the New Orleans Police. At the hearing in this court, Howard specifically denied again and again that the New Orleans Police had coerced him in any way in giving his testimony in the state court.

[*Witness of Low Mentality*]

The witness Howard appears to be a person of low mentality. Unquestionably, as the evidence shows, he has been subjected to great pressures from persons seeking to help these petitioners since his testimony in the state court. Certainly his credibility leaves much to be desired, but there is no evidence whatever, other than the statements prepared by others and signed by Howard, that Howard either committed perjury or was coerced into committing perjury. While Howard definitely was an important witness in the state's case against the petitioners, the testimony of Penedo and Miss Rajek was at least as important. Both specifically identified the petitioners, not only in the state court trial but in this court, as the two persons who had raped Miss Rajek. Their credibility is unchallenged except in so far as the possibility of human error is always present in the identification of persons in the circumstances in suit.

Petitioners, throughout this long litigation, have been represented by competent counsel of their own choosing. Their case has been considered by the Supreme Court of Louisiana and the Supreme Court of the United States on two separate occasions. Their case has been before the lower courts of the state and nation innumerable times. This court has, in effect, retried the petitioners for the offense of which they have been convicted. While it must be owned that the conviction of a Negro of rape of a white female in this state should be subjected to the severest scrutiny, on the basis of the record made here, this Court cannot say that these petitioners were denied due process of law.

Writ discharged.

TRIAL PROCEDURE
Indictments—California

In the Matter of Richard R. CARDWELL and Billie JONES, Petitioners.

United States Court of Appeals for the Ninth Circuit, November 27, 1957, 256 F.2d 576.

SUMMARY: Acting without counsel, two California state prisoners convicted on narcotic charges filed a document denominated "Causa Et Origo Est Materia Negotii" with the federal Court of Appeals. The petitioners prayed that the court "grant this immediate action to insure the rights of petitioners' indigent circumstances, to show that the laws are for all the nobly born, the well connected and those of grosser clay, in the instant action persons of a different race than the majority of the community." The Court declared that no writ existed with such a name but treated the document as a petition for a Writ of Habeas Corpus, collaterally attacking the indictments under which petitioners had been convicted, sentenced, and imprisoned. The petition was denied since the indictments in question charged a crime and no other defect can be asserted in a habeas corpus proceeding.

PER CURIAM.

This court has received a document filed jointly by the above mentioned petitioners denominated "Causa Et Origo Est Materia Negotii" stating, "they believe they have a good cause in Causa Et Origo Est Materia Negotii." They pray that this court "grant this immediate action to insure the rights of petitioners' indigent circumstances, to show that the laws are for all the nobly born, the well connected and those of grosser clay, in the instant action persons of a different race than the majority of the community."

Their document cites Black's Law Dictionary, Coke, the U.S. Code and the Rules of Court of "the English Supreme Court." It is difficult to translate the document before us to anything more than the statement of these facts:

(a) "Causa Et Origo Est Materia Negotii" is a Latin phrase correctly translated by petitioners as "The cause and origin is the substance of the thing."

(b) Petitioners, (looking at a certified copy of the amended indictment under which, in the state courts of California, petitioner Cardwell was charged with eight counts of sale of narcotics, and petitioner Jones with two counts of the sale of narcotics, and with one prior narcotic conviction), find the signature of the Grand Jury Foreman typed, rather than signed by hand. They apparently urge that this entitles them to their release from prison.

This is a collateral attack upon an indictment. It is not an appeal. There is no such thing known to our law as a *writ* "Causa Et Origo Est Materia Negotii."

The most charitable interpretation we can arrive at is to consider this remarkable document as the equivalent of a Writ of Habeas Corpus, based upon the theory that petitioners' conviction was void. 28 U.S.C.A. § 2241 (a), (c) (3) and § 2243. The sufficiency of an indictment upon which petitioner was convicted and sentenced may not be challenged by a petition for habeas corpus. Only when it plainly appears on the face of the record that no crime was charged in an indictment can a court by habeas corpus, inquire into validity of the indictment. Bergemann v. Backer, 157 U.S. 655, 15 S.Ct. 727, 39 L.Ed. 845; Brock v. Hudspeth, 10 Cir., 111 F.2d 447.

The Petition is denied as to each petitioner.

LEGISLATURES

EDUCATION
Governor's Address—Arkansas

Shortly after the U.S. Court of Appeals for the Eighth Circuit had denied a delay in integration at Little Rock (3 Race Rel. L. Rep. 621), Governor Orval Faubus ordered a special session of the Arkansas General Assembly to deal with school and other problems. When the legislature convened on August 26, 1958, the governor gave his reasons for the session in a special address. The proclamation calling the special session and the text of the governor's address follow:

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

TO ALL TO WHOM THESE PRESENTS SHALL COME—GREETINGS:

Whereas, conditions exist that in my judgment and in my opinion, seriously endanger public education in the State of Arkansas, and the peace and tranquility of the citizens of this State; and

Whereas, I have determined that this is an extraordinary occasion, making it necessary to call the General Assembly into extraordinary session;

Now, therefore, I, Orval E. Faubus, Governor of the State of Arkansas, by virtue of the power and authority vested in me by the Constitution of the State, Article 6, Section 19, do hereby call an Extraordinary Session of the General Assembly to convene at the seat of the government in the State Capitol on Tuesday, August 26, 1958, at eleven o'clock in the morning, and I hereby specify the purposes for which the General Assembly is convened to be the following:

To consider and, if so advised, enact laws for the following purposes:

1. To regulate the administration and financing of public schools and education, and to make appropriation for such purposes.
2. To make appropriation to pay the expenses and per diem of this Extraordinary Session of the General Assembly.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed. Done in office in the City of Little Rock on this 23rd day of August, 1958.

s/Orval E. Faubus
GOVERNOR

GOVERNOR'S ADDRESS

Governor Gordon, Mr. Speaker, Gentlemen of the 61st General Assembly, in Extraordinary Session assembled,

My fellow citizens—

As I have said many times in awarding Arkansas Traveler Certificates to people who had distinguished themselves in public service, with every honor goes responsibility, with every privilege goes burdens.

This is one of the times when we, who have been honored by our fellow citizens by our election to public office, feel more heavily the responsibilities and the burdens that go with the public trust, than we do its honors and privileges.

But he who cannot carry the load through the storm, deserves little the bouquet in the sunshine.

[*Responsibility To Face Problems*]

We are here today, not through our own choice and desires, but because it is our responsibility to face up to some problems that have been forced upon us, by the unwise actions of others.

I quote from a news story of last Saturday and Sunday, because it has a definite relation to the cause which brings us here today.

"The Supreme Court has been usurping the rights reserved to the States by the Constitution."

"The Supreme Court has been making hasty, impatient decisions without proper judicial restraint."

"Recent decisions raise considerable doubt as to the validity of the American boast that we have a government of laws and not of men."

"The development of immense power of the Supreme Court in both state and national affairs, is second only to the increasing dominance of the national government."

"It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for."

These are not my words, nor the words of State Senator Jerry Screeton or U.S. Senator John L. McClellan, nor of any particular States' Rights advocate. These words are in the report, adopted only last Saturday by a conference of Chief Justices of the State Supreme Courts. These eminent jurists represent all the states and two territories. This unprecedented report, strongly condemning the United States Supreme Court in the language I have quoted above, was adopted by thirty-six favorable votes,—four and one-half times as many as the eight opposing votes.

The resolution said also:

"This conference (of State Supreme Court Chief Justices) hereby respectfully urges that the Supreme Court of the U.S., in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and state powers * * * exercise one of the greatest of all judicial powers—the power of judicial self-restraint."

Let us see how this admonition fits the recent majority decision of the Eighth Circuit U.S. Court of Appeals. From that decision, I quote the following language:

"From the practically undisputed testimony of the Boards' witnesses, we find that . . . the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops . . .

"It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals, the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of Southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided."

". . . . In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them'; here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

"Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the District, disrupting of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances."

"Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock."

"Accordingly, the order of the District Court is reversed, with directions to dismiss the appellee's petition."

What, then, is the substance of this ruling?

[*Integration Paramount to Court*]

It means that to the court, integration is paramount to all other considerations.

1. That it is paramount to the purpose for which schools are established—that of educating our children. Even though education in the schools be seriously impaired, or utterly destroyed, still integration must prevail.

2. The sociological factors, upon which the original Supreme Court decision was based, have been ignored in this case by the Court of Appeals. Who knows what the effect may have been, or will be, on youngsters who attended school last year under the conditions described? Did the illegal use of federal troops to break a custom of three hundred years standing, create such disrespect for authority in the minds of some students, that they will have less regard for all law and authority in the future? The implications of harm to the students in this respect are almost numberless and, of course, impossible to calculate.

3. There is the matter of a rule of law that is applicable to every government that has ever existed—that the maintenance of peace and good order in time of crisis becomes and is paramount to all other rights and considerations. To my knowledge, this basic duty and law of governments everywhere, has never, until recent times, been challenged by any court.

This basic rule of law was discarded by the decisions of Federal Judge Davies last fall, and by the recent ruling of the Eighth Circuit Court of Appeals in upsetting the wise and judicious decision of Federal Judge Lemley. According to Judge Davies and the Eighth Circuit Court, it matters not how bad the conditions that may exist; it matters not if a hundred people are slain in the streets or the corridors of a school; it matters not how great the destruction of property; it matters not whether the parents know that their children may return home grievously wounded because of disorders, or whether they may return at all. Integration is paramount to these considerations.

To these extreme views, I cannot subscribe. I now quote from a statement made by me last September:

"Maybe Negro leaders and white integrationist leaders, and even Federal Judge Davies, are willing to sacrifice the lives of a certain number of people in this community in order to take one more step toward final and complete integration of the schools. Let that be their philosophy—it is not mine. The price is too high, and the danger too great."

I do not challenge the right of the NAACP to attempt to bring about total and complete integration of the races. Regardless of whether it is good or bad for them, or for others, they still have that right.

As evidence of my good faith in my attitude expressed toward peaceful integration according to the will of the people, I cite again the following from a previous statement by me:

"The integration of all forms of transportation in Arkansas."

"The integration of institutions of higher learning, including the University of Arkansas, the School of Medicine (Medical Center in Little Rock), and five state-supported colleges."

"The peaceful integration of more public schools in Arkansas, than have been integrated in seven other Southern States combined, including the so-called moderate States of North Carolina, Tennessee, and Florida."

"The placing of Negroes in party posts, and also public positions, both elective and appointive."

These steps, along with other peaceful progress in the field of integration, should prove to anyone and everyone, that whatever the term, "deliberate speed" may mean, Arkansas has attained it more quickly, or approached it more closely, than any other state with a comparable problem.

[*Disagrees With Methods*]

My disagreement is with the methods now being employed, and the unseemly haste that is being demanded.

There is a law of life that can never be violated, or hurried, without great harm to all concerned, and that is the law of evolution in relation to social and political change.

An excellent example is the long struggle to gain the right of franchise for all people of this republic. It lasted from the founding of the English Colonies until the granting of woman suffrage in 1920. It is significant that it came by the adoption of a Constitutional Amendment by the states, and not by a federal Court decree.

Chief Federal Judge Gardner aptly phrased this rule in his memorandum of dissent to the Court of Appeals ruling when he wrote:

> "Such changes, if successful, are usually accomplished by evolution rather than by revolution, and time, patience, and forbearance are important elements in effecting all radical changes."

Judge Gardner further stated:

> "The action of Judge Lemley was based on realities and on conditions, rather than on theories."

The case for peaceful, evolutionary progress in the field of social change, as opposed to change by law, court edict, or force, was most clearly and concisely stated by the great writer, Dorothy Thompson, in a column dated New York, September 11, 1957:

> "For no law can operate to achieve its desired ends if it runs counter to the existing state of consciousness and conscience of the community. A law to be effective must be respected. To be respected, the overwhelming majority must believe it to be right. Respect is not created by statute. No one can respect what he firmly believes to be wrong. Where a law is in harmony with public standards, its upholders (the police) find allies in the people. Where the law is not thus in harmony, the police appear as public enemies. Then *peaceable enforcement becomes impossible.*
>
> "If a Negro child has to fight his way into a White school, the opposite of an educational situation has been created, and White and Negro alike, each reflecting the feelings of the adult communities from which they come, are educated in hatred and feelings of aggression. What good does 'the protection of the law' do a child who is scorned and ostracized by his mates?" . . .

[*No Clear Federal Statute*]

And I may add to this quotation, that there is no clear cut federal statute regarding the integration of schools. If there were, it would be unconstitutional, for the authority to control public education has never been delegated by the states to the federal government. It must be remembered that the federal government is a creature of the states and possesses only those powers delegated to it by the states.

Surely Judge Gardner drew upon all the wisdom of his many years of experience when he penned this summary of our problem, coupled with his admonition for caution:

> "For centuries there have been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished practice could not suddenly be changed without resistance."

Last September when I acted to preserve the peace and domestic tranquility in the Little Rock area, I charted my course on the law as declared by one of the most eminent and respected men to ever serve on the United States Supreme Court—Justice Oliver Wendell Holmes. Almost fifty years ago, in the case of Moyer v. Peabody, (53 L.Ed. 411) he reviewed the duty of a governor to maintain the peace in his state, and this is what that great judge had to say on the subject:

> "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

With this background, and the tense uneasiness, deep concern, and genuine fear that exists in this community and state at this time, we come to the immediate problem.

The problem is how to preserve the peace and prevent the disorder and violence, which appears certain to occur with the forcible integration of the Little Rock schools.

[*NAACP Objective*]

The NAACP objective of the moment is the successful integration of Central High School by any means, including force. However, the plan already approved by the Board and the Federal Court, calls for the complete integration of all Little Rock schools. In the recent conference with the school board and the superintendent, it was stated that there was no target date for the integration of Hall High, but the plan calls for its integration. All Little Rock schools will be integrated, and in the near future, East Side Junior High, now all white, will be integrated with approximately fifty percent Negro students and fifty percent white students.

This information was obtained from the superintendent, the three school board members present, and their attorneys, and received by me, two of my attorneys, and Lt. Governor Nathan Gordon, President Pro Tem of the Senate, Lee Bearden, and Speaker of the House, Glenn Walther.

[*Suggested Legislation*]

To preserve the peace, prevent disorder and violence, and retain for the citizens of our state, the basic right to control our own affairs through the democratic processes, I recommend to the members of the House and Senate, for your consideration the following measures:

A measure providing for the closing of a school or schools, for any of the following reasons:

First: In order to maintain the peace against actual or impending violence which endangers the citizens, students, teachers, and others, and to provide for the safety of buildings and property.

Second: Where a school or schools has been ordered to integrate by any court, and federal force is employed on or about the grounds to enforce the order.

Third: Whenever it is determined that a general suitable and efficient educational system cannot be maintained in any school district because of the integration of the races.

This measure also provides for the calling of an election within thirty (30) days after the closing of any school for any of the above reasons. At the election, the people of the district may vote on the question of keeping the school segregated or integrated. The election would be held in the usual manner by the same officials as would hold other school elections.

If the people of the district vote to integrate the school, it will be opened on an integrated basis, otherwise it will be kept closed, and other provisions must be found for the education of the children who would otherwise attend such school.

A measure to provide for the withholding of certain state funds from any school closed under the provisions of the Act. This Act also provides for each child's proportionate share of school funds to follow the student to any other school in this state in which he may choose to enroll. This can be another school within the district, a school in another district, or a private non-profit school. This measure will not change in any way, the method now used in allocating state funds or the funds of any school district under the Minimum Foundation Program Law.

A measure which provides for the enrollment and attendance of a student in any other school in the same district, or the school of another district, under certain conditions.

A measure which provides that no student shall ever be denied the right to enroll in and receive instruction in any course in any public school in the state by reason of his or her refusal to attend classes with a student of another or different race.

A measure which provides for an appropriation for the Chief Executive in the carrying out of his duties under this program, and to defray the expenses of school district elections called by the Governor.

A measure which provides for the postponement of the opening date of certain high schools from September 2 to September 15.

[*Exceeding Regret*]

Gentlemen, may I say to you in the deepest humility and sincerity that it is with exceeding regret that I have determined this extraordinary session of the Legislature to be necessary.

We must do whatever is possible to protect the rights of our people, and preserve for them and their posterity, the democratic processes of government which we all cherish so much.

This battle for States' Rights and Constitutional Government is not of our choosing, as has been the case many times in the history of the past; the issue has been forced upon us and we must either choose to defend our rights against those who would usurp them, or else surrender.

We, as public servants, elected by the vote of our people, would be unworthy of the confidence reposed in us, and of the honor bestowed upon us, should we be unwilling to face the issues as free men should, and do everything in our power that is possible to be done.

I hope that no one of you will be influenced by the words of the weak and the fearful, and that no one of you will be misled by the mistaken views of those who would surrender all the rights and privileges we have enjoyed, to an all powerful federal government in the unwise course of action which it pursues at the present moment. The issues which must be faced and decided by free men have never been easy, and the tasks which must be performed by a people who would remain free, have always been difficult.

This is not a half serious problem, and it cannot be met with half measures. The bills I have recommended to you are the product of many fine and able minds, and represent a great deal of hard work. I ask that you consider these measures as a package program.

[*Word of Caution*]

And now, in conclusion, to you, as men of responsibility and good judgment, I leave these words of caution:

Any remark on the floor of either the House or Senate during your deliberations, will be charged to some extent, to the people of our state. I would, therefore, caution you to be both deliberate and circumspect in your remarks and actions. It is not a time for gestures and posturing, but rather a time for calm and deliberate speech and action.

The eyes of the nation are upon us; the hopes, and the prayers of millions of our fellow citizens of our sister states are with us in our efforts.

With deep and abiding faith in our Creator, and in the people of this republic, I recall these words from our National Anthem:

Then conquer we must, for our cause, it is just; And this be our motto, "In God is our trust".

EDUCATION

Appropriation—Arkansas

Act No. 15 (House Bill No. 13) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, provides additional funds for the attorney general in handling school legal affairs.

AN ACT for the purpose of assisting the orderly administration of the public schools and the educating of the children of the State of Arkansas; for the purpose of making an appropriation to provide additional personnel and other expenses for the office of the Attorney General.

WHEREAS, the General Assembly of the State of Arkansas has determined that the Office of Attorney General in the past year has been deluged with the prosecution and defense of numerous lawsuits dealing with the orderly administration of the public schools of Arkansas, and

WHEREAS, it is in the public interest that the Attorney General's Office have sufficient, capable personnel and financial assistance to adequately represent the State of Arkansas in such matters that affect the public schools thereof; NOW THEREFORE,

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. There is hereby appropriated from the General Revenue Fund to defray expenses in connection with litigation affecting the orderly administration of the public school system the following sums for the period beginning September 1, 1958, and ending June 30, 1959:

ATTORNEY GENERAL'S OFFICE

One Assistant Attorney General	$ 5,600.00 per annum
One Secretary	3,600.00 per annum
Maintenance, operation, travel, and expenses of witnesses and investigations	10,000.00
Total	$19,200.00

Section 2. It has been found and determined by the General Assembly of the State of Arkansas that the Office of Attorney General has been called upon to represent the State of Arkansas, both in the prosecution and defense, in many lawsuits directly affecting the proper and orderly administration of the public school system of the State of Arkansas; and that the current appropriation of the Attorney General's Office is inadequate to cope with conditions existing. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

EDUCATION
Public School Funds—Arkansas

Act No. 5 (House Bill No. 3) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, provides for the withholding of state funds during the time any school is closed by order of the governor.

AN ACT to Provide for the Withholding of a Portion of the State Aid Otherwise Allocable to a School District During the Period of Time Any School in Any Such District Shall Be Closed by Order of the Governor of This State; to Provide for the Payment From Any Funds so Withheld to Other Public Schools and Accredited Non-Profit Private Schools During the Period of Enrollment and Continuance of Study Therein of Any Students of Said School so Ordered to Be Closed by the Governor; to Authorize the State Board of Education to Adopt, and Enforce, Such Reasonable Rules and Regulations Not Inconsistent with the Provisions Hereof as it Shall Determine to be Necessary or Desirable to Effectuate the Purposes and Intent of This Act; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Nothing in this Act contained shall be so construed as to alter, amend, or in any other manner change the method of determining the amount of State funds allocable to the public schools of a county, or of any school district therein, under the Minimum Foundation Program Law, or other applicable State aid school law, by reason of the closing of any school therein by order of the Governor of this State.

Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such school, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order for the benefit of the said school district for maintenance and operation; plus, and also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.

Section 3. Should any of the students of any school so closed by order of the Governor determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds contained in Act 305, approved March 27, 1957, shall be usable for the purposes herein provided.

Section 4. For the purpose of determining the amount of State funds so to be withheld, and thereafter paid out, after the date of any such continuing closing order, the State Board of Education, or the Commissioner of Education, may call upon the Legislative Auditor, the State Comptroller, or other State officer or employee, to assist whenever auditorial assistance or advice shall be required.

Section 5. The State Board of Education shall have the power to adopt, and enforce, such reasonable rules and regulations not inconsistent with the provisions of this Act as it shall determine to be necessary or desirable to effectuate the purposes hereof.

Section 6. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, such holding shall not affect the remainder of this Act.

Section 7. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children, that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

EDUCATION
Public School Funds—Arkansas

Act No. 8 (House Bill No. 6) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, provides supplemental funds for the use of the governor in connection with school segregation problems.

AN ACT to Appropriate Funds for Use of the Governor in Relation to Regulating the Administration and Financing of Public Schools and Education.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. There is hereby appropriated, to be payable from the General Revenue Fund,

for the use of the Governor in carrying out the functions, powers and duties of his office with relation to regulating the administration and financing of public schools and education, the following:

(A) For Salary of additional Administrative Assistant to Governor for the period beginning September 1, 1958, and ending June 30, 1959, (10 months @ $625.00 per month)	$ 6,250.00
(B) For Professional Services and Extra Help	16,000.00
(C) For Maintenance and Travel Expense	2,750.00
(D) For Expense of School District Elections Called by the Governor	75,000.00
Total Appropriated	$100,000.00

Section 2. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children; that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

EDUCATION

Public School Transfers—Arkansas

Act No. 6 (House Bill No. 4) of the 1958 Extraordinary Session of the 1958 Arkansas General Assembly, approved September 12, 1958, provides for the transfer of students from one school or school district to another school or school district under certain circumstances.

AN ACT to Make Provision for the Transfer of Students From One School or School District to Another School or School District Under Certain Circumstances; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Any student residing in the attendance area of any school where racial integration exists, or is imminent, may enroll and attend classes in any other school within the same district or in the school of another district within the State whereof the student enrollee and other students are of the same race, and where racial integration neither exists nor is imminent, provided that, except for place of residence and applicable laws relating to transfer of students between districts, the student is otherwise eligible.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section 3. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the

races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children; that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

EDUCATION
Recall of School Officials—Arkansas

Act No. 9 (House Bill No. 8) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, sets up procedures for the recall of school officials.

AN ACT to assist in the administration and regulation of the public schools of Arkansas; authorizing the recall of school board members; prescribing the prerequisites therefor, and for other purposes.

WHEREAS, the citizens of many of the school districts of the State of Arkansas are dissatisfied with the elected school officials therein, and

WHEREAS, no means currently exists under which such officials may be recalled from their office and a vote taken to ascertain whether the citizens therein prefer to allow such official or officials to continue in office; NOW THEREFORE,

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. It is hereby declared that the purpose of this act is to assist in the administration and education in the public schools of Arkansas, and it is hereby determined that it will be beneficial to provide a method of recalling school directors in the manner hereinafter provided.

Section 2. For the purpose of this act the term "recall" means the voting by the people of any school district in the State of Arkansas to ascertain whether or not it is the desire of the majority of the electors therein to allow a school board member or members to remain in that capacity for the duration of his or their elected term.

Section 3. Upon the filing of a petition signed by not less than ten per cent (10%) of the qualified electors of any school district in the State of Arkansas petitioning that any school board member or members currently holding office should be placed upon a ballot for the determination by a majority of the electors in the district of the question of whether the school board member or members should remain in that capacity, an election shall be called by the county board of election commissioners within 10 days after notice from the county clerk of the sufficiency of the petition.

Section 4. The petition as provided herein shall be filed with the county clerk who shall ascertain the sufficiency of the petition within three days after receipt thereof. Failure on the

part of the county clerk to comply herewith shall be deemed nonfeasance in office under the criminal laws of Arkansas, and subject him to removal from office under the penal provisions thereunder.

Section 5. The petition as required by this act shall be substantially as follows:

PETITION FOR RECALL

To the Honorable_____
County Clerk of.....County, Arkansas
We, the undersigned legal voters of_____ _____School District,_____County, Arkansas, respectfully order that (Name of school director or directors)_____ _____ be referred to the people of said District, _____ to the end that such person or persons may be approved or rejected by the vote of the legal voters of the District, at an election to be held for this purpose; and each of us for himself says: I am a qualified elector of_____ _____School District,_____County, Arkansas, and my residence, postoffice address and voting precinct are correctly written after my name.

Name	Residence	Postoffice	Voting Precinct

Each and every sheet of every such petition containing the signatures shall be verified in substantially the following form, by the person who circulated said sheet of said petition by his or her affidavit thereon as a part thereof:

STATE OF ARKANSAS)
COUNTY OF_____)

I, _____, being first duly sworn, state that (here shall be legibly written or printed the names of the signers of the sheet) signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence. I believe that each has stated his name, residence, postoffice address and voting precinct correctly, and that each signer is a legal voter of the State of Arkansas, _____County, _____ School District.

Signature _____
P. O. _____

Subscribed and sworn to before me this the_____day of_____, 19__.

Signature _____
Clerk, Notary, Judge or J. P.
P. O. _____

Forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and technical errors.

Section 6. All elections held under the provisions of this act shall be paid for from the general county funds.

Section 7. In the event that a majority of the qualified electors voting at the election shall vote in favor of removing the subject school board member or members, a vacancy or vacancies are hereby declared to exist.

Section 8. Vacancies occurring under the provisions of this act shall be filled by the county judge. Persons appointed to fill the vacancies hereunder may also be recalled under the provisions of this act.

Section 9. All laws and parts of laws in conflict herewith are hereby repealed except Act 30, Ark. Acts of 1935, § 4 [Ark. Stats. (1947) § 80-504], pertaining to vacancies occurring other than under the terms of this act.

Section 10. If any section, sentence, clause, or word of this act shall be declared unconstitutional, such declaration shall not affect the remaining portion or portions of this act.

Section 11. It has been found and declared by the General Assembly that many citizens are currently dissatisfied with the school board members serving their district; that certain school officials have administered the school laws inefficiently; that such school districts currently have no method of coping with this situation, and the passage of this act will alleviate such conditions and thereby provide for the more efficient administration and operation of the public education system in such school districts. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

EDUCATION
School Closing—Arkansas

Act No. 4 (House Bill No. 2) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, provides for procedures by which the governor may order closing of schools.

AN ACT to Provide the Procedure Under Which the Governor May Order to Be Closed the Schools of Any School District; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. The Governor shall, by proclamation filed with the Secretary of State, and with the Board of Directors of any school district affected, and with the County Board of Election Commissioners of the appropriate county:

(A) Order any school or all schools of the district to be closed immediately, and he is hereby specifically empowered to use all forces at his command to execute such order; and

(B) Call a special election to be held in the school district within thirty (30) days thereafter, whenever

(a) he shall determine that in order to maintain the peace against actual or impending domestic violence in any public school district, whereof the lives or limbs of the citizens, students, teachers or other employees of any school, or the safety of buildings or other property in the school district are endangered, he (the Governor) may, acting in his discretion, order any school in the district to be closed; or

(b) integration of the races in any school, or all schools, of the school district has been decreed by an order of any court, and pursuant to the enforcement thereof, the President, or other officer of the United States Government, whether of the executive, legislative, or judicial branch, causes troops, whether regular troops or the federalized National Guard, United States Marshals, or other force at the federal level, to be stationed in, on or about any such public school; or

(c) he shall determine that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integration of the races in any school within that district.

Section 2. (A) The proclamation of the Governor shall fix the date of the election, and the Governor shall give at least five (5) days' notice of such election by publication by one (1) insertion in a newspaper either published in or having a bona fide circulation in the county or counties in which the school district is located.

(B) The County Board of Election Commissioners shall designate all polling places, provide the election supplies, appoint the judges and clerks for holding the election, and shall otherwise have supervision over the conduct of the election. At the close of the election, the judges at each polling place shall make a return of the votes, certified by the clerks of the election, and file it in the office of the County Clerk of the County in which said district is administered, for immediate delivery to the County Board of Election Commissioners, which said Board shall immediately, but not later than the fifth (5th) day next following the election, proceed to ascertain and declare the result of the election and certify its findings to the Governor.

(C) At any such election, it shall not be necessary to have a ballot title, but there shall be printed on the ballot, the following:

FOR RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE ..... SCHOOL DISTRICT . . . . . ☐

AGAINST RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE ..... SCHOOL DISTRICT . . . . . ☐

(D) The result of the election shall be proclaimed by the Governor, by proclamation, filed with the Secretary of State and with the Board of Directors of the school district in which such election was held.

(E) If a majority of the qualified electors of the district shall vote in favor of racial integration of all schools within the school district, then the Board of Directors of the district shall, with all deliberate speed after receipt of such proclamation, cause all such schools to be integrated;

otherwise, no school within the district shall be integrated.

(F) Cost of publication of notice of the elections, and all other expenses incurred in relation thereto, shall be paid by the State.

Section 3. Should any member of the school board, or the superintendent, principal or any other supervisory personnel, or any other employee of the district fail or refuse to immediately implement the carrying out of, or carry out, the said closing order, the said failure or refusal shall be cause for immediate removal and the Governor shall declare the office or position of employment vacant; and thereupon the Governor shall, by appointment, fill any such vacancy until the next regular school election or for the remainder of the term of employment.

Section 4. Any school closed by executive order authorized by this Act shall remain closed until such executive order is countermanded by proclamation of the Governor filed with the Secretary of State and the Board of Directors of the school district.

Section 5. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, such holding shall not affect the remainder of this Act.

Section 6. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children; that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

EDUCATION

School Employees' Affiliations—Arkansas

Act No. 10 (Senate Bill No. 8) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, requires school officials and employees to list organizations to which they belong and have belonged as a condition to employment.

"AN ACT to Provide Assistance in the Administration and Financing of Public Schools, and to Require Affidavits from Administrative and Professorial Employees, Including Superintendents, Principals, and Instructors of the Elementary and Secondary Schools, and Colleges and Universities of the State of Arkansas Relative to all Incorporated and/or Unincorporated Associations and Organizations to which they have Belonged or Have Been Affiliated with for the Past Five Years; to Provide Penalties for Failure to Comply, and for Other Purposes."

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. It is hereby declared that the purpose of this act is to provide assistance in

the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

Section 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

Section 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS
COUNTY OF .....

I, (name of affiant), being an applicant for the position of ..... at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(names and addresses of organizations)

and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(names and addresses of organizations)

.....
Signature of Affiant

Subscribed and sworn to before me this .....day of ....., 19.....

.....
Signature and Title of Official

Section 4. Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

Section 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

Section 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

Section 7. It is hereby determined that the

decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

EDUCATION
Separate Classrooms—Arkansas

Act No. 7 (House Bill No. 5) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, provides for the setting up of separate classes for white and Negro students under certain circumstances.

AN ACT to Provide Separate Classes for Instruction in the Public Schools of Arkansas for Children of the White and Negro Races Under Certain Conditions, to Provide a Choice of Classes for Students Under Certain Conditions, to Provide Penalties for Interference with a Student's Choice of Classes, and for Other Purposes.

WHEREAS, the Supreme Court of the United States predicated its school integration decision upon the psychological effect of segregated classes upon children of the Negro race, and, at the same time, ignored the psychological impact of integrated schools upon certain white children who observe segregation of the races as a way of life; and

WHEREAS, legislation is necessary in order to protect the health, welfare, well-being, and educational opportunities for such white children; NOW THEREFORE

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. No student shall ever be denied the right to enroll in, and receive instruction in, any course in any public school in the State of Arkansas by reason of his or her refusal to attend a class with a student of another or different race.

Section 2. Any person who interferes or attempts to interfere through coercion, intimidation, or otherwise, with a student's choice of classes, as set forth in Section 1 hereof, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than one hundred dollars ($100.00) and not more than five hundred dollars ($500.00); and, in addition to such fine, such person shall be confined to the county jail for a period of not less than thirty (30) days and not more than ninety (90) days, and shall be ineligible for public office or employment by the State of Arkansas or any political subdivision thereof for a period of three years.

Section 3. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children; that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of

buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

CIVIL DISTURBANCES
School Property—Arkansas

Act No. 17 (Senate Bill No. 11) of the 1958 Extraordinary Session of the Arkansas General Assembly, defines and prohibits disorderly conduct on school property, in school cafeterias, and in business houses, and provides penalties.

AN ACT to assist in the administration of the educational program of the public schools provided by the State of Arkansas, and in conjunction therewith to prohibit any person from creating a disturbance or breach of the peace on any public school property, school cafeteria, or any public place of business; to prescribe the penalty therefor; and for other purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Any person who shall enter upon any public school property, school cafeteria, or any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six months, or both such fine and imprisonment.

Section 2. It has been found and is declared by the General Assembly of the State of Arkansas that many persons have entered upon school premises and other public places of business in order to create disturbances or breaches of the peace, and that such disturbances and breaches of the peace directly affect the orderly administration of the public schools of the State of Arkansas, and there is an immediate need for a method of preventing such practices. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect from the date of its approval.

LITIGATION
Practice of Law—Arkansas

Act No. 11 (House Bill No. 9) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, eliminates the exemption from unauthorized practice statutes previously allowed "to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy."

AN ACT to assist in the orderly administration of the educational facilities provided by the taxpayers of Arkansas in that it amends Act 182, Ark. Acts of 1929, Section 5 [Ark. Stats. (1947) § 25-209] wherein certain corporations or associations heretofore exempted from the pro-

hibition of the illegal and unauthorized practice of law, said exempt corporations having heretofore used such exception to bring law suits or participate therein, thus causing disharmony in the administration of the public schools of Arkansas; and for other related purposes.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. Act 182, Ark. Acts of 1929, § 5 [Ark. Stats. (1947) § 25-209] is hereby amended to read as follows:

"This act [§§ 25-205–25-210] shall not apply to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or a voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may become a party."

Section 2. It has been found and declared by the General Assembly that the orderly administration of the educational facilities of Arkansas have been subjected to abuse by reason of the exemption granted them under the terms of Act 182, Ark. Acts of 1929, § 5 and it is to the public interest that our public schools be administered without such interference, and the passage of this act will tend to alleviate such a situation. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

LITIGATION
Barratry—Arkansas

Act No. 14 (House Bill No. 12) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, defines and provides punishment for barratry.

AN ACT to assist in the administration of the educational program of the public schools and institutions of higher learning provided by the state of Arkansas, and in conjunction therewith to provide a definition for the crime of barratry; to provide penalties therefor; and for other purposes.

WHEREAS, it has been determined by the Sixty-First General Assembly, Extraordinary Session, that certain persons as hereinafter defined have engaged in causing the institution of certain unnecessary litigation affecting the orderly administration of the public schools and institutions of higher learning, and

WHEREAS, it is further determined that the passage of this act will tend to alleviate the breaches of the peace, discourage barratry as hereinafter defined, both of which adversely affect the orderly administration of the public schools and institutions of higher learning maintained by the taxpayers of Arkansas; NOW THEREFORE,

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. For the purposes of this act the crime of barratry is hereby defined as any of the following:

A. Any person who shall engage in exciting and stirring suits and quarrels between individuals, or between an individual and the State, or between an individual and any legal entity, either at law or otherwise, shall be guilty of the crime of barratry.

B. Any person who commits an act tending to breach the peace, with the purpose of or intention of such act resulting in a suit or litigation, either civil or criminal, shall be guilty of the crime of barratry.

C. Any person who seeks out and proposes to another person that they present and urge a suit against another person, the State of Arkansas, the United States or any other legal entity shall be guilty of the crime of barratry.

D. Any person who counsels, proposes, encourages, aids or assists another in the commission of acts tending to breach the peace, with the purpose of, or intention of such acts resulting in litigation between individuals or an individual and the State or an individual and any legal entity shall be guilty of the crime of barratry.

E. Any person who thereby seeks to obtain employment for himself or for another to prosecute or defend such action.

F. Any person who has no direct and substantial interest in the relief thereby sought.

G. Any person who does so with intent to distress or harass any party to such action.

H. Any person who directly or indirectly pays or promises to pay any money or other thing of value to, or the obligations of, any party to such an action.

I. Any person who directly or indirectly pays or promises to pay any money or thing of value to any other person to bring about the prosecution or maintenance of such an action.

J. Any person who shall wilfully bring, prosecute or maintain an action, at law or in equity, in any court having jurisdiction within the State, and who:

(1) has no direct or substantial interest in the relief thereby sought, or

(2) thereby seeks to defraud or mislead the court, or

(3) brings such action with intent to distress or harass any party thereto, or

(4) directly or indirectly receives any money or other thing of value to induce the bringing of such action, shall be guilty of the crime of barratry.

Section 2. The term "person" and the term "individual" are hereby declared to include a corporation, whether profit or non-profit, and associations.

Section 3. Any corporation or unincorporated association found guilty of the crime of barratry shall be forever barred from doing any business or carrying on any activity within the State, and in the case of a corporation, its charter shall be summarily revoked by the Secretary of State.

Section 4. The crime of barratry shall be punishable by a fine of not more than five thousand dollars ($5,000.00), or by imprisonment of not more than two years, or both, and in addition thereto may be enjoined by any interested person or persons.

Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 6. The provisions of this act are cumulative and shall not be construed as repealing any existing statute or the common law of this State with respect to the subject matter of any of the provisions hereof.

Section 7. It has been found and is declared by the General Assembly of Arkansas that many persons are currently engaged in soliciting litigation that is interfering with and directly affects the orderly administration of the Arkansas public education system and that there is an immediate need for a method of preventing such practices. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety shall take effect from the date of its approval.

ORGANIZATIONS
Filing Requirements—Arkansas

Act No. 12 (House Bill No. 10) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, requires the filing of certain information by organizations "engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools . . ."

AN ACT to provide assistance in the administration and financing of the public schools of Arkansas and for the maintenance of law, peace, and order in the operation of the public

schools; requiring certain organizations to file certain information under oath in the county clerk's office upon the request of the county judge; providing a penalty for violations and for other purposes.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. It is hereby declared that the purpose of this act is to provide for the maintenance of law, peace and order in the operation and administration of the public schools by requiring certain organizations engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, and which activities may result in a serious disturbance of the public peace, to register and report certain information upon the request of the county judge. The General Assembly further declares that the disclosure of such information is essential to the health, safety and general welfare of the people of Arkansas.

Section 2. The term "organization" as used herein means any group of persons, whether incorporated or unincorporated, and includes any civic, fraternal, political, mutual benefit, legal, medical, trade or other kind of organization.

Section 3. Any organization operating or functioning within any county of this State engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, upon the request of the county judge of such county shall file with the county clerk's office the following information, subscribed under oath, before a notary public, within seven days after such request is made:

A. The official name of the organization and list of members.

B. The office, place of business, headquarters or usual meeting place of the organization.

C. The officers, agents, servants, employees or representatives of the organization.

D. The purpose or purposes of the organization.

E. A statement disclosing whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

It shall be the duty of the person having custody or control of the records of the organization to furnish the information herein required.

Section 4. Information filed pursuant to Section 3 of this act is hereby declared public and subject to the inspection of any interested party.

Section 5. Any person or organization who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), and each day of violation shall constitute a separate offense. All penalties collected under this section shall be forwarded to the State Treasurer and by him credited to the common public school fund.

Section 6. The county clerk shall receive the sum of two dollars ($2.00) for recording the information as herein required which sum shall be forwarded to the State Treasurer and there credited to the common public school fund.

Section 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

Section 8. It has been found and declared by the General Assembly that it is vital to the public interest and welfare that information to the extent herein provided be obtained with respect to organizations whose activities are causing or may cause interference with the orderly administration of the public school system, which constitutes a threat to the public peace. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

ORGANIZATIONS
Inspection of Records—Arkansas

Act No. 13 (House Bill No. 11) of the 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, authorizes the Attorney General to visit the offices of organizations which "have interfered with the peace and proper administration of the public schools and institutions of the State of Arkansas" and inspect records and otherwise procure evidence of tax evasion, or other illegal activity.

AN ACT to provide for assistance in the administration and financing of the public schools of Arkansas, and in conjunction therewith, authorizing the Attorney General to visit the offices of various organizations or associations, whether incorporated or not, for the purpose of procuring evidence to the effect that such organizations or associations have hindered the orderly administration of the public schools or have violated other laws of the State of Arkansas.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. It is hereby declared that the purpose of this act is to assist in the administration and financing of the public schools and higher educational facilities now provided by the State of Arkansas, and in conjunction therewith, it is hereby declared to be the intent of the General Assembly that in view of the fact that certain organizations, whether incorporated or not, have heretofore interfered with the peace and proper administration of the public schools and institutions of the State of Arkansas, and it is in the public interest to such schools and institutions that the Attorney General of the State of Arkansas have such powers as is hereinafter provided for.

Section 2. If the Attorney General of the State of Arkansas should ascertain or have reason to believe that any organization or association, whether incorporated or not, has evaded, attempted to evade, or has defrauded the State of Arkansas of taxes due it under the laws of the State of Arkansas, he may, upon the procurement of an order ex parte from any Chancery Court authorizing him and the duly elected sheriff or his deputy to visit the office or headquarters of any organization or association, and there secure copies, photostatic or otherwise, reproduce, photograph, or otherwise record any and all evidence found evidencing the fact that such organizations or associations have evaded or defrauded the State of Arkansas of the payment of the legal amount of taxes due and payable by such organizations or associations, or has otherwise violated any of the laws of the State of Arkansas.

Section 3. Any person, firm or corporation refusing the Attorney General access to its files, records, correspondence or other data, may be summarily taken before the Court issuing the visitation order and there held in contempt of the Court's order.

Section 4. Any person violating the provisions of Section 2 shall also be guilty of a misdemeanor of said refusal, and upon conviction thereof may be fined in a sum of not less than fifty dollars ($50.00), nor more than five hundred dollars ($500.00), plus imprisonment not to exceed a term of six months, or both fine and imprisonment.

Section 5. Evidence procured pursuant to the provisions of this act shall be admissible in all courts.

Section 6. The provisions of this act shall in no wise repeal the existing laws pertaining to the collection of the corporate franchise taxes, but shall be cumulative thereto.

Section 7. If any section, provision, clause or word of this act shall be judicially declared to be unconstitutional, such declaration shall not affect the remaining portions.

Section 8. It has been found and is declared by the General Assembly of Arkansas that certain organizations and associations have been hindering the orderly administration of the public schools and institutions of higher learning and have defrauded the State of Arkansas of the payment of certain taxes, and the passage of this act will alleviate such conditions. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

LITIGATION
Maintenance—Arkansas

Act No. 16 (House Bill No. 14) of the 1958 Extraordinary Session of the Arkansas General Assembly, defines, prohibits, and provides penalties for maintenance.

AN ACT to prohibit the fomenting and agitation and litigation that interferes with the orderly administration of public schools and institutions of higher learning; to prohibit the solicitation, receipt, or donation of funds for the purpose of filing or prosecuting lawsuits; to define maintenance; to provide a penalty for any violation hereof; and for other related purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. It shall be unlawful for any person, firm partnership, corporation, group, organization, or association, either incorporated or unincorporated, either before or after proceedings commenced,

(1) to promise, give, or offer, or to conspire or agree to promise, give or offer,

(2) to receive or accept, or to agree or conspire to receive or accept,

(3) to solicit, request, or donate, any money, bank note, bank check, chose in action, personal services or any other personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, or for the purpose of assisting such person to commence or prosecute further, any proceeding in any court or before any administrative board or other agency of the State of Arkansas, or in any United States court located within the said State; provided, however, this section shall not be construed to prohibit the constitutional right of regular employment of any attorney at law or solicitor in chancery, for either a fixed fee or upon a contingent basis, to represent such person, firm partnership, corporation, group, organization, or association before any court or administrative agency.

Section 2. Any person violating any of the provisions of section 2 of this act shall be guilty of maintenance and, upon conviction thereof, shall be punished by imprisonment for one year in the State penitentiary.

Section 3. Every person who commences or prosecutes or assists in the commencement or prosecution of any proceeding in any court or before any administrative agency in the State of Arkansas, or who may take an appeal from any such rule, order, or judgment thereof, shall, on motion made by any of the parties of such proceedings or by the court or agency in which such proceeding is pending, file with such court or agency, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

> I, (name), petitioner (or complainant, plaintiff, appellant or whatever party he may be) in this matter, do hereby swear (or affirm) that I have neither received, nor conspired to receive, any valuable consideration or assistance whatever as an inducement to the commencement or further prosecution of the proceedings in this matter.
>
> (Signature of Affiant)
>
> Affiant
>
> Sworn to and subscribed before me on this, the (date) day of (month), 19 (year).
>
> (Signature of Official)
>
> (Title of Official)

In the case of any firm, corporation, group, organization, or association required to make the above affidavit, such affidavit shall be made by the person having custody and control of the books and records of such firm, corporation, group, organization, or association.

Section 4. Every attorney representing any person, firm, partnership, corporation, group, organization, or association in any proceeding in any court or before any administrative agency in the State of Arkansas, or who may take an appeal from any rule, order, or judgment thereof, shall, on motion made by any of the parties to such proceeding, or by the court or agency in which such proceeding is pending, file, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

> I, (name), attorney representing (name of party), petitioner (or complainant, plaintiff, appellant or whatever party he may be)

in this matter, do hereby swear (or affirm) that neither I nor, to the best of my knowledge and belief, any other person, firm, partnership, corporation, group, organization, or association has promised, given, or offered, or solicited, received, or accepted any valuable consideration or any assistance whatever to said (name of party) as an inducement to said (name of party) to the commencement or further prosecution of the proceedings herein.

(Signature of Affiant)

Affiant

Sworn to and subscribed before me on this, the (date) day of (month), 19 (year).

(Signature of Official)

(Title of Official)

Provided, however, that if, on motion made, such affidavits are promptly filed, the failure in the first instance to have filed same shall not constitute grounds for a continuance of such proceedings.

Section 5. Every person or attorney who shall file a false affidavit shall be guilty of perjury and shall be punished as provided by law. Every attorney who shall file a false affidavit, or who shall violate any other provision of this act, upon, final conviction thereof shall also be disbarred by order of the court in which convicted. Any attorney who shall file a false affidavit, or violate any other provision of this act, and who is not a member of the Arkansas Bar shall, in addition to the other penalties provided by this act, be forever barred from practicing before any court or administrative agency of this State.

Section 6. No person shall be excused from attending or testifying or producing evidence of any kind before a grand jury, or before any court, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the provisions of this act on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of, any transaction, matter, or thing, concerning which he may be required to testify or produce evidence, documentary or otherwise, before the grand jury or court or in any cause or proceeding; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or by imprisonment for not more than one hundred eighty (180) days, or by both such fine and imprisonment.

Section 7. Provided, however, that the provisions of this act shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not pay or protect the client from payment of the costs and expenses of litigation, nor shall this act apply to suits pertaining to or affecting possession of or title to real or personal property, nor shall this act apply to suits involving the legality of assessment or collection of taxes, nor shall this act apply to suits involving rates or charges by common carriers or public utilities, nor shall this act apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Arkansas State Bar.

Nothing in this act is intended to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy; the intent, as herein set out, is to prohibit and punish, more clearly and definitely, champerty, maintenance, barratry, and the solicitation or stirring up of litigation whether the same be committed by licensed attorneys or by others who are not real parties in interest to the subject matter of such litigation.

Section 8. If any section, subsection, clause, phrase, or requirement of this act is for any reason held to be unconstitutional, void or unenforceable, such decision shall not affect the validity of the remaining portions.

Section 9. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involved the health, safety and general

welfare of the people of the State of Arkansas and that the purpose of this act is to assist in the solution of these problems, and that the passage of this act will tend to prevent interference with the orderly administration of the public schools of Arkansas. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

ELECTIONS
Registration—Louisiana

Act No. 517 (House Bill 1185) of the 1958 regular session of the Louisiana Legislature, approved July 9, 1958, extends the prohibition on selling of votes to include registrations.

AN ACT to amend and re-enact Sub-section (6) of Section 369 of Title 18, Louisiana Revised Statutes of 1950, as amended, to prohibit the buying or selling of registrations and to provide a penalty therefore.

Be it enacted by the Legislature of Louisiana:

Section 1. That Sub-Section (6) of Section 369 of Title 18, Louisiana Revised Statutes of 1950, as amended, is amended and re-enacted to read as follows:

(6) Buy a vote or a registration or offer money or anything of value for the vote or registration of any other person or receive money or anything of value or the promise thereof for his vote or registration.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

EDUCATION
School Placement—Louisiana

Act No. 259 (House Bill No. 945) of the 1958 regular session of the Louisiana Legislature, approved July 2, 1958, authorizes a study of the efficiency of public education, and sets up an interim school placement program.

AN ACT to declare the public policy of the State of Louisiana with respect to public education; to provide for further study and analysis as a basis for general reconsideration of the efficiency of the system in promoting the progress of pupils in accordance with their aptitudes and in furtherance of social order and good will; pending such reconsideration to authorize city and parish school boards to provide for the continuation or establishment of schools, facilities and curricula and the placement of pupils therein so as to assure the best practical educational curriculum and environment for the individual pupils consistent with the educational progress of others and the paramount function of the state's police power to assure social order, good will and the public welfare; to establish the right of parents or guardians to withdraw children from public schools under certain conditions; to authorize the attorney general to render advice and assistance to local school boards; to limit the liability of school boards, officials and employees in the exercise of their official responsibilities; to provide for appeals from the decisions of such boards of education

in certain cases; to repeal all laws in conflict herewith, including Act 556 of 1954 designated as Section 81.1 of Title 17 of the Revised Statutes of 1950.

Be it enacted by the Legislature of Louisiana:

Section 1. The legislature finds and declares that the rapidly increasing demands upon the public economy for the continuance of education as a public function and the efficient maintenance and public support of the public school system require, among other things, consideration of a more flexible and selective procedure for the establishment of schools, facilities and curricula and as to the qualification and assignment of pupils.

The legislature also recognizes the necessity for a procedure for the analysis of the qualifications, motivations, aptitudes and characteristics of the individual pupils for the purpose of placement, both as a function of efficiency in the educational process and to assure the maintenance of order and good will indispensable to the willingness of its citizens and taxpayers to continue an educational system as a public function, and also as a vital function of the sovereignty and police power of the State.

Section 2. To the ends aforesaid, the State Board of Education shall make continuing studies as a basis for general reconsideration of the efficiency of the educational system in promoting the progress of pupils in accordance with their capacity and to adapt the curriculum to such capacity and otherwise conform the system of public education to social order and good will. Pending further studies and recommendations by the school authorities the legislature considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with request on behalf of the pupil would be disruptive to orderly administration, tend to invite or induce disorganization and impose an excessive burden on the available resources and teaching and administrative personnel of the schools.

Section 3. Pending further studies and legislation to give effect to the policy declared by this Act, the respective parish and City School Boards, hereinafter referred to as "local School Boards," are not required to make any general reallocation of pupils heretofore entered in the public school system shall have no authority to make or administer any general or blanket order to that end from any source whatever, or to give effect to any order which shall purport to or in effect require transfer or initial or subsequent placement of any individual or group in any school or facility without a finding by the local Board or authority designated by it that such transfer or placement is as to each individual pupil consistent with the test of the public and education policy governing the admission and placement of pupils in the public school system prescribed by this Act.

Section 4. Subject to appeal in the limited respect herein provided, each local Board shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the Board as provided herein, the Board may exercise this responsibility directly or may delegate its authority to the Superintendent of Education or other person or persons employed by the Board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and

psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

Local School Boards may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth.

Section 5. Local School Boards may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining parishes and for transfer of school funds or other payments by one Board to another for or on account of such attendance.

Section 6. A parent or guardian of a pupil may file in writing with the local School Board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, the Board shall act upon the same within 30 days, stating its conclusion. If a hearing is requested the same shall be held beginning within 30 days from receipt by the Board of the objection or or petition at a time and place designated by the Board.

The Board may itself conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be final on behalf of the Board. The School Board is authorized to designate one or more of its members or one or more competent examiners to conduct any such hearings, and to take testimony, and to make a report of the hearings to the entire Board for its determination. No final order shall be entered in such case until each member of the School Board has personally considered the entire record.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations.

For the purpose of conducting hearings or investigations hereunder, the Board shall have the power to administer oaths and affirmations and the power to issue subpoenas in the name of the State of Louisiana to compel the attendance of witnesses and the production of documentary evidence. All such subpoenas shall be served by the sheriff or any deputy of the parish to which the same is directed; and such sheriff or deputy shall be entitled to the same fees for serving such subpoenas as are allowed for the service of subpoenas from a district court. In the event any person fails or refuses to obey a subpoena issued hereunder, any district court of this State within the jurisdiction of which the hearing is held or within the jursdiction of which said person is found or resides, upon application by the Board or its representatives, shall have the power to compel such person to appear before the Board and to give testimony or produce evidence as ordered; and any failure to obey such an order of the court may be punished by the court issuing the same as a contempt thereof. Witnesses at hearings conducted under this Act shall be entitled to the same fees as provided by law for witnesses in the district courts, which fees shall be paid as a part of the costs of the proceeding.

Section 7. Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the School Board. If in connection therewith a requested assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

Section 8. The findings of fact and action of the Board shall be final except that in the event that the pupil or the parent or guardian, if any, of any minor or, if none, of the custodian of any such minor shall, as next friend, file exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States, or any right under the

laws of Louisiana, and the Board shall not, within fifteen days reconsider its final action, an appeal may be taken from the final action of the Board, on such ground alone, to the District Court of the Judicial District in which the School Board is located, by filing with the Clerk of said Court within thirty (30) days from the date of the Board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the Federal Constitution, or State law, accompanied by bond with securities approved by the Clerk of said Court conditioned to pay all costs of appeal if the same shall not be sustained. A copy of such petition and bond shall be filed with the President of the Board. The filing of such a petition for appeal shall not suspend or supersede an order of the Board; nor shall the court have any power or jurisdiction to suspend or supersede an order of the Board issued under this Act before the entry of a final decree in the proceeding, except that the court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for appeal, after a preliminary hearing, and upon a prima facie showing by the petitioner that the Board has acted unlawfully to the manifest detriment of the child who is the subject of the proceeding.

On such appeal the District Court may, as in other cases, summon a jury for the determination of any issue or issues of fact presented. Appeal may be taken from the decision of the District Court in the same manner as appeals may be taken in other suits, either by the appellant or by such Board.

Section 9. The Board before whom any objection or proceeding with respect to the placement of pupils is pending may, upon authorization in writing of a majority of the Board, request the Attorney General of Louisiana to appear in such proceedings as amicus curiae to assist the Board in the performance of its judicial functions and to represent the public interest. Expenses of court reporters, subpoenas, witness fees and other costs of such proceedings approved by the Board shall be the obligation of the city or parish involved, and shall be paid from the public school funds of such city or parish.

Section 10. No School Board or member thereof, nor its agents or examiners, shall be answerable to any charge of libel, slander, or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statements made in the course of proceedings or deliberations provided for under this Act.

Section 11. The provisions of this Act are severable, and if any section or provision of this Act shall be held to be in violation of the Constitution of Louisiana or of the United States, such decision shall not affect the validity or enforceability of the remainder of this Act.

Section 12. All laws and parts of laws in conflict herewith be and the same are hereby repealed, including Act 556 of 1954, which has been incorporated in the Louisiana Revised Statutes of 1950 as Title 17, Section 81.1.

EDUCATION
Tuition Grants—Louisiana

Act No. 258 (House Bill No. 944) of the 1958 regular session of the Louisiana Legislature, approved July 2, 1958, provides for a system of education expense grants for children attending non-sectarian non-public schools where no racially-segregated public school is provided.

AN ACT to provide for a system of education expense grants for children attending non-sectarian non-public schools where no racially separate public school is provided and to repeal all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. The Legislature of Louisiana recognizes and hereby affirms that knowledge, morality, and adherence to fundamental principles of individual freedom and responsibility are

necessary to good government and the happiness of mankind; and further affirms that schools and the means of education ought forever to be encouraged. The value and importance of our public schools are known and acknowledged by our people. It is further recognized that our public schools are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. Our people need to be assured that no child will be forced to attend a school with children of another race in order to get an education. It is the purpose of the State of Louisiana to make available, under the conditions and qualifications set out in this Act, education expense grants for the private education of any child of any race residing in this State. Such grants as are provided herein are made to and for the child, and not to the institution furnishing the educational facilities. In so doing it is the hope of the Legislature of Louisiana that all peoples within our state shall respect deeply-felt convictions, and that our public school system shall be continually strengthened and improved, and sustained by the support of all our citizens.

Section 2. Every child residing in this state for whom no public school is available, or who is assigned to a public school attended by a child of another race against the wishes of his parent or guardian or the person standing in loco parentis to such child, is entitled to apply for an education expense grant from state and local funds appropriated for that purpose. Such grants shall be available only for education in a private nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, shall, in addition, be available only when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race. For purposes of this Act nonsectarian school is defined as a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any individual or individuals acting on behalf of a church or sectarian body.

Section 3. It shall be the policy of the state to make an education expense grant available to each eligible child, as provided under this Act, which is equal to the per-day, per-student amount of state and local funds expended on public schools throughout the state during the preceding school year, but in no event, shall a grant for any child exceed the amount actually expended for the private education of such child. The local school board shall determine the maximum amount of the grant to be made available to each child, and in so doing, shall take into account the total expenditures for all current expenses.

Section 4. Application for an education expense grant shall be made to the school board of the parish or city in which the child resides. Such application shall be on standard forms prescribed by the State Board of Education for that purpose and shall be signed under oath or affirmation by the parent or guardian of or the person standing in loco parentis to the child for whom application is made.

Section 5. Application for an education expense grant shall be approved if the school board to whom application is made finds that:

(a) The child for whom application is made resides within the parish or city;

(b) There is no public school available for such child, or such child is now assigned against the wishes of his parent or guardian or of the person standing in loco parentis to such child to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race; and

(c) Such child is enrolled in or has been accepted for enrollment in a private nonsectarian school, recognized and approved by the Louisiana State Board of Education.

Section 6. Each application for an education expense grant shall specify the number of school days for which the grant is requested, but in no event shall any one application be for more than one school year or the equivalent of one hundred and eighty (180) school days. If the conditions of Section 5 of this Act continue to be met application may be filed on behalf of a child, who has received benefits under a previous application, for another school year or part thereof.

Section 7. Upon approving the application for an education expense grant from state and local funds, the board of education shall give notice in writing to the parent or guardian or person standing in loco parentis to the child

concerned of an education grant commitment for a specified number of school days and for a specified amount for each school day, but no one commitment shall exceed one hundred and eighty (180) school days. So long as the requirements set out in paragraphs (a) and (c) of Section 5 of this Act are met during the period of the education grant commitment, the board, unless requested otherwise by the parent or guardian or person standing in loco parentis, shall continue payments under such commitments notwithstanding the fact that a change of conditions since approval of the application may make it reasonable and practicable to assign such child to a public school not attended by a child of another race.

Section 8. Upon disapproval of an application for an education expense grant, payable from state and local funds, the school board shall give notice to the applicant by registered mail, and any applicant may within ten (10) days after receipt of such notice apply to such board for a hearing, and shall be given a prompt and fair hearing on the question of entitlement to an education expense grant. The board shall render prompt decision upon such hearing, and if the board shall affirm its previous action of disapproval of the application, notice shall be given to the applicant by registered mail, and any applicant aggrieved by the action of the board may within ten (10) days after receipt of such notice file a petition in the District court of the parish in which the board sits for a hearing in the matter on all questions of fact and of law. Notice of the petition shall be properly served upon the school board. The board shall have fifteen (15) days after receipt of notice of the petition within which to prepare and furnish to the petitioner or his attorney a certified transcript of the record in the case for filing in the District court, which record shall include a copy of the application and any official orders and rulings of the board in the case. Additional time for preparation of the record may be granted to the board, for good cause, upon motion before the clerk of the district court. The petition in the district court may be heard by the resident judge of the district or by the judge presiding at a term of court in that district, and such judge shall have authority to take testimony and examine into the facts of the case, and to determine all questions of fact and of law, and enter judgment thereon. From the judgment of the District court an appeal may be taken by the petitioner or the board in the same manner as other appeals are taken from judgments of such court in civil actions.

Section 9. Payments of education expense grants shall be made by check upon receipt of satisfactory evidence that the child for whom payment is made actually attended a private nonsectarian school, recognized and approved by the Louisiana State Board of Education. The school attended shall furnish, upon forms prescribed by the State Board of Education, a sworn certificate signed by the director or other appropriate official of the school, showing the number of school days actually attended by the child for whom payment is made. A child is deemed to be in attendance, within the meaning of this Section, although temporarily absent due to illness or other good cause, so long as such child is enrolled in the school as a bona fide student. Checks in payment of education expense grants shall be made payable jointly to the parent or guardian of or the person standing in loco parentis to the child and the school which the child attended, and shall be mailed to the parent or guardian or person standing in loco parentis or the school as mutually agreed upon for endorsement; provided, that if the school attended shall indicate in its certificate that the tuition and expenses for such child have already been paid the check shall be made payable to the parent or guardian or person standing in loco parentis alone and mailed to such individual.

Section 10. Payments of education expense grants shall be made by each school board monthly, bimonthly or quarterly in accordance with uniform regulations adopted and promulgated by the State Board of Education. The State Board of Education is authorized and directed to prescribe standard forms for application for grants, for notice of education grant commitment, for certificates of attendance, and such other forms as may be necessary or desirable in the administration of the provisions of this Act. The State Board of Education shall have general supervision and administration of the funds provided by the Legislature for education expense grants, and it is intended that such funds shall be managed and allotted by the State Board of Education.

Section 11. Payments of individual education expense grants from State and local funds shall be made only by vouchers signed by the president and the Treasurer of the parish or city school board of education. The fiscal procedures prescribed in other Acts of this State, unless in conflict with some specific provision in this Act, shall apply to the handling and management of State and local funds appropriated for education expense grants.

Section 12. No education expense grant shall be paid for any child except for attendance at a private nonsectarian school as approved by the Louisiana State Board of Education. It shall be the duty of the State Board of Education to maintain a current list of all such approved schools and to furnish such information from time to time to parish and city school boards. Payment of education expense grants for or on behalf of any child attending such a school shall not vest in the State of Louisiana, the State Board of Education or any agency or political subdivision of the State any supervision or control whatever over such non-public schools or any responsibility whatever for their conduct and operation.

Section 13. The parish and city school boards may appropriate amounts from any local tax or non-tax funds and state funds for an education expense grant. In no event, shall the total of grants for any one child, from State and local funds, exceed the amount of actual expenses incurred in the private education of such child.

Section 14. Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this Act to be sworn or affirmed to shall be guilty of perjury, and upon conviction shall be punishable by a fine and imprisonment as other persons committing perjury are punishable.

Section 15. It shall be unlawful for any parent or guardian or the person standing loco parentis to a child to accept any payment authorized by this Act knowing that the child for whose benefit the payment is received did not actually attend, or was not actually a bona fide student at, a private nonsectarian school during the period for which payment is received. Any person violating this Section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five (5) years or by a fine of not more than five thousand dollars ($5,000.00) or by both such fine and imprisonment.

Section 16. It shall be unlawful for any official or employee of any school, acting wilfully or corruptly, to receive any payment of a grant authorized by this Act, knowing that said school is not entitled to such payment. Any person violating this Section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five (5) years or by a fine of not more than five thousand dollars ($5,000.00) or by both such fine and imprisonment.

Section 17. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

BLOOD BANKS
Labeling—Louisiana

Act 519 (Senate Bill No. 12) of the 1958 regular session of the Louisiana Legislature, approved July 19, 1958, provides for the labeling of human blood, and requires the consent of the person receiving a transfusion, or his next of kin, before blood from a person of a different race may be used.

AN ACT to provide that all human blood used or proposed to be used for blood transfusions shall be labeled according to the race of the donor; to provide that no human blood not labeled in accordance with the provisions of this Act shall be used for blood transfusions in this state; to provide that any person about to receive a blood

transfusion or a parent, or the next of kin of said person shall be informed of the race of the donor of the blood, if blood from a person of a different race is to be used; to provide that a doctor may proceed with a transfusion without compliance with the provisions of this Act if an emergency exists; to provide that emergency and disaster areas are exempt from the provisions of this Act if the emergency has been declared by the Governor, a municipal governing authority or a federal agency having the authority to declare an emergency; to provide a penalty for the violation of the provisions of this Act; and to repeal conflicting laws.

Be it enacted by the Legislature of Louisiana:

Section 1. All human blood used or proposed to be used in the State of Louisiana for transfusions of blood shall be labeled with the word "Caucasian", "Negroid", or "Mongoloid" or some suitable designation so as to clearly indicate the race of the donor of such blood. No human blood not labeled in accordance with the provisions of this Act shall be used for transfusions in the State of Louisiana.

Section 2. Any person about to receive a blood transfusion or a parent of said person, or the next of kin of said person shall be informed of the race of the donor of the blood proposed to be used if it is proposed to use blood from a person of a different racial classification.

Section 3. In the event that there are, in the opinion of the doctor, emergency circumstances existing, a transfusion may be given without regard to the provisions of this Act, provided the doctor shall certify to the fact that there was such an emergency.

Section 4. The provisions of this Act shall not apply to emergency and disaster areas if such an emergency has been declared by the Governor, a municipal governing authority or a federal agency having the authority to declare such an emergency.

Section 5. Any person who shall violate any of the provisions of this Act shall be guilty of a misdemeanor and shall pay a fine of not more than One Hundred (100.00) Dollars or shall be imprisoned for not more than thirty (30) days, or both.

Section 6. All laws or parts of laws in conflict herewith are hereby repealed.

ELECTIONS
Registrars—Louisiana

Act No. 482 (House Bill 951) of the 1958 regular session of the Louisiana Legislature, approved July 9, 1958 extends the duties of the Attorney General to include the defense of legal actions against registrars in cases involving federal voting rights.

AN ACT to amend and re-enact Section 255 of Title 49 of the Louisiana Revised Statutes of 1950, relative to the duty of the Attorney General to defend certain legal actions, to give aid and assistance to Registrars of Voters, their assistants and employees in certain cases and the repeal of all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 255 of Title 49 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

Section 255. Suits involving title to land of the state or its agencies; federal actions against any Registrar of Voters or of his assistants or employees.

The Attorney General shall, upon the request of the Governor, represent the state or any political agency or subdivision thereof, in any suit in any court involving the title to any land or real property belonging to the state or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the state or in the name of any of its political agencies or subdivisions.

The Attorney General shall give his advice and aid to any Registrar of Voters, deputy Registrar of Voters, and/or any employees of a Registrar of Voters, whose official acts have been or are being inquired into, challenged or disputed before any Federal Court, Federal Grand Jury, Federal Board, Federal Commission or Federal official, and he shall represent any Registrar of Voters, assistant Registrar of Voters, or employee in any suit or prosecution instituted in a Federal Court which relates to the official conduct of his office, all without costs or expense to said Registrar, Deputy Registrar and/or employee.

Section 2. All laws or parts of law in conflict herewith are hereby repealed.

ADMINISTRATIVE AGENCIES

COMMISSION ON CIVIL RIGHTS
Advisory Committees—Federal Statute

Reproduced below are by-laws issued by the Federal Commission on Civil Rights to govern the operation of state advisory committees as such are established under authority of the Civil Rights Acts of 1957 [2 Race Rel. L. Rep. 1011 (1957)].

STATE ADVISORY
COMMITTEE BY-LAWS

Name and Establishment

1. The (State or Territory) Advisory Committee to the Commission on Civil Rights (hereinafter called the State Committee) is established by authority of the provisions of Public Law 85-315 of the 85th Congress, the "Civil Rights Act of 1957" (hereinafter called the Act).

2. Upon request of the Commission on Civil Rights (hereinafter called the Commission), the State Committee will exercise the following functions and responsibilities:

(a) Advise the Commission in writing of any knowledge or information it has of any alleged deprivation of the right to vote and to have the vote counted by reason of color, race, religion or national origin within (State or Territory).

(b) Attend as observers, any open hearings the Commission may hold in (State or Territory).

(c) Advise the Commission of all information concerning legal developments constituting a denial of equal protection of the laws under the Constitution.

(d) Advise the Commission upon matters of mutual concern in the preparation of its final report.

(e) May receive reports, suggestions and recommendations from individuals and public and private organizations interested in Section 104(a) of the Act, and the State Committee may forward to the Commission its analyses and evaluation of such reports and suggestions.

(f) Notwithstanding the foregoing provisions, the State Committee may on its own initiative forward advice and recommendations to the Commission relative to any subject which the Committee believes falls within the purview of Section 104(a) of the Act.

Membership

3. The State Committee shall consist of not less than five nor more than nine members appointed by the Commission. Members of the State Committee shall serve at the pleasure of the Commission.

Officers

4. (a) The officers of the State Committee shall be a Chairman and Vice-Chairman and such other officers as the State Committee deems advisable.

(b) The Chairman shall be appointed by the Commission.

(c) The Vice-Chairman and other officers shall be elected by the State Committee by a majority vote of the full membership of the Committee.

(d) The Chairman, or in his absence the Vice-Chairman, shall:

(1) Call meetings of the State Committee.

(2) Preside over all meetings of the State Committee.

(3) Appoint all special committees to the State Committee.

(4) Perform such other functions as the State Committee may authorize or the Commission may direct.

Special Subcommittees

5. The State Committee may:

(a) Approve the establishment of special subcommittees, composed of its own members, to study and report upon matters under consideration and it may authorize such special subcommittees to take specific action upon matters within the competence of the state Committee.

(b) Create, with the prior written approval of the Commission, either geographical or special "subject matter" subcommittees. The subcommittee members, with the exception of the subcommittee chairman, need not be from the State Committee.

Meetings

6. (a) Meetings of the State Committee shall be called whenever it is deemed necessary or desirable by the Chairman, a majority of the members of the State Committee, or by the Commission. However, for purposes of reimbursement of travel expenses, "authorized meetings" will be those which receive prior written approval of the Commission.

(b) In all meetings for the transaction of business, a majority of the full membership of the State Committee shall constitute a quorum.

(c) Summary minutes shall be prepared and made available as soon as practicable to the members of the State Committee and the Commission.

Funds

7. (a) State Committee members will serve without compensation but may be reimbursed by a per diem subsistence rate not to exceed $12.00 per day and travel expenses to "authorized Committee meetings", as defined above in paragraph 6(a).

(b) Due to limited funds available to the Commission, no compensation (travel or subsistence) of any kind will be paid to subcommittee members who are not members of the State Committee, nor shall other appropriated funds be made available to the State Committee except for the aforementioned reimbursements.

EMPLOYMENT

Fair Employment Laws—Kansas

The latest annual report of the Kansas Anti-Discrimination Commission was issued on July 30, 1958. Portions of that report indicating activities of the Commission in the field of fair employment practices and recommending legislation in that field are reproduced below.

* * *

Introduction

This year's Annual Report of the Commission will take a slightly different form than its predecessors. This is due primarily to two conditions; first, the Commission this year felt that the publishing of the Annual Report should coincide with the fiscal year rather than the calendar year, and secondly, a major staff change during the time period leaves several gaps that cannot easily be covered. The period covered by this report dates from February, 1957 to July, 1958.

Aside from these superficial changes the work of the Commission has progressed to a point where it is receiving recognition not only within the State but also from other agencies outside of Kansas. There is much that remains to be done but the beginning has been made, and the Kansas Anti-Discrimination Commission continues to move ahead.

* * *

Program Information

Section I of the Kansas Act Against Discrimination (Chapter 44, Article 10, 1953 Supplement to the General Statutes) declares it to be

the public policy of the State to eliminate discrimination in all employment relations. It further declares that the opportunity to secure and to hold employment without discrimination because of race, color, religion, or national origin is a civil right, and to protect this right, the law provides for the establishment of the Kansas Anti-Discrimination Commission.

Basically, the Commission's job is to help the State effectuate its policy against employment discrimination. In working to accomplish this objective, the Commission has two major responsibilities:

a. To develop a broad-range educational program designed to prevent and eliminate discrimination in employment against persons because of race, color, religion, or national origin.
b. To receive, investigate, and resolve complaints alleging discrimination in employment against persons because of race, color, religion, or national origin.

Commission Staff

The Commission is composed of five members, appointed by the Governor, representing management, labor, and the public. It is interracial and non-partisan, serves without pay and has only an executive secretary and a secretary as its staff.

Work of the Commission

The Kansas Anti-Discrimination Commission has two primary functions; first, to help to see that all people have an equal opportunity to employment regardless of race, color, creed, or national origin, and secondly, to carry out a broad educational program to improve Human Relations in Kansas, specifically in the field of employment.

Looking first to the regulatory work of the Commission it should be noted that during the time period covered by this report the Kansas Anti-Discrimination Commission received and processed 20 formal complaints and 4 informal complaints. This makes the total number of complaints filed with the Commission since its creation come to 41 formal and 51 informal complaints.

To file a formal complaint an individual must feel that he has been discriminated against because of his race, color, religion, or national origin; fill out a form provided by the Commission, state his complaint in writing, and have his statement notarized. Informal complaints are complaints which the Commission receives from persons alleging discrimination but who do not wish to file written affidavits.

The following chart shows the current status of the formal complaints filed with the Commission during the time period covered in this report.

Complaints filed	20
Cases closed	3
Pending	17

The majority of the pending cases are concerned with problems of discrimination in the up-grading of employees.

The four basic reasons why more cases have not been closed are:

1. Lack of enabling powers in the law.
2. Insufficient funds to allow for more intensive field work.
3. The lack of sincere cooperation on the part of some employers.
4. The fact that employees do not feel that the present law provides them with any protection should they file a complaint.

It is worthy to note that during this time period the Kansas Anti-Discrimination Commission has received numerous requests for assistance in problems of discrimination in housing and public accommodations. It is regrettable that the restrictive nature of the Kansas law against discrimination does not allow the Commission to provide professional assistance for these human relations problems. On an *advisory basis* the Kansas Anti-Discrimination Commission could do much to relieve tensions that are developing in these areas.

Educational Program

The following chart gives a brief survey of how the educational program operated during the time period covered by this report:

1. Pieces of Literature distributed	
a. *Hiring Negro Workers*	5,000
b. *Annual Report 1957*	2,000
c. *Bibliography*	1,000
2. *Reflector* sent out (The K.A.D.C. Newsletter)	3,000
3. Films provided for programs	32

4. Filmstrips provided for programs 17
5. Speaking engagements filled 19

All of these aspects of the Kansas Anti-Discrimination Commission's educational program are made available to interested parties on request.

Aside from these rather traditional parts of the program the Commission has engaged in such other activities as giving program planning assistance to the Kansas Council of Churches, individual churches, civic clubs, social clubs, libraries, high schools, colleges, and graduate school students in the study of Human Relations, and a variety of other activities.

The Commission itself has a need for education and consequently from time to time its staff attends professional conferences to keep abreast of the latest developments in the field.

Financial Report

Since this report covers 16 months, or parts of two different fiscal years, an accurate accounting on the total sum would not be very meaningful. For this reason the following chart concerns itself just with the fiscal of year 1958.

FISCAL YEAR 1958

	Amount	*Spent*	*Balance*
Appropriation	$15,000.00		
Salaries & Wages	9,053.00	8,513.40	539.60
Other Operating Expenditures (rent, telephone, postage, office supplies, Commission meetings, subsistence, etc.)	5,947.00	5,947.00	.....
TOTAL	$15,000.00	14,460.40	539.60

The amount of $539.60 was reverted back to the State General Revenue Fund. Money appropriated for salaries and wages can only be spent for salaries and wages.

During the 1958 Budget Session of the Legislature the Kansas Anti-Discrimination Commission received an appropriation of $17,500 for the fiscal year, 1959. The amount of this increase left over after compensating for the rise in costs will allow for some small expansion of the Commission's educational program.

Recommendations

During the past year the Kansas Anti-Discrimination Commission has spent considerable time and effort in studying the needs of Kansas in the field of Civil Rights Legislation. The final results of this study are not yet available but they will be published in the future.

Since it is the Commission's desire to make the most meaningful and carefully thought out recommendations that it is capable of, the following suggestions are tentative and stand to be amended by the final report of the current study.

Tentative Legislative Recommendations

1. There is a definite need for legislation that will give the Kansas Anti-Discrimination Commission recourse to uphold its findings of discriminatory employment practices. These practices have been declared to be against the State policy but without adequate legislation the Kansas Anti-Discrimination Commission is unable to uphold the State policy of fair employment for all people.
2. Problems of Human Relations cannot be separated or treated in arbitrary groupings. For these reasons it has become increasingly evident that the Kansas Anti-Discrimination Commission's concern should and could rightfully be extended to the areas of housing and public accommodations.
3. The professional staff of the Commission must be enlarged.
4. A sufficient budget must be granted for the efficient functioning of the Kansas Anti-Discrimination Commission. The average per capita expenditure in the other States that have an Anti-Discrimination Commission is $.021. If Kansas is to compare favorably with this average our budget should be around the $40,000 level.

* * *

This then has been a report of the activities of the Kansas Anti-Discrimination Commission covering the time period from February, 1957 to July, 1958. In summary, it can be said that all of the Commission's activities have helped Kansas to become a better place in which to live for all people.

EMPLOYMENT
Fair Employment Laws—Wisconsin

On July 31, 1958, the Fair Employment Practices Division of the Wisconsin State Industrial Commission issued its report of activities for the two years ending June 30, 1958. Excerpts from that report follow:

* * *

Conferences re: F. E. P.

957 contacts regarding fair employment practices, were made in the state of Wisconsin during the biennial period.

840 of the above total were made with business and industrial organizations.

117 were made with labor organizations, employment services, governmental units, professionals, et al.

("The Commission shall confer, cooperate with, and furnish technical assistance to employers, labor unions, educational institutions and other public or private agenices in formulating programs, educational and otherwise, for the elimination of discrimination.") (Sec. 111.35 (5)).

155 of the **840** conferences with business and industrial management, and **6** of the conferences had with labor organizations, involved complaints alleging discrimination.

("The Commission may receive and investigate complaints charging discrimination .... If the commission finds probable cause to believe that any discrimination... has been or is being committed, it shall immediately endeavor to eliminate the practice by conference, conciliation or persuasion.") (Sec. 111.36)

70 cases were processed by the Fair Employment Practices Division during the biennial period. Of this number,

probable cause to credit the allegation was found in **50** instances and the matter was adjusted;
in **2** cases the Division found no cause to credit the allegation of complaint but did find other questionable practices or policies which were adjusted;
in **17** situations no probable cause was found to credit the allegation and the specific complaints were dismissed. In such **17** situations no other discriminatory practices or policies were found;

1 case was withdrawn by the complainant.

There were 201 sessions had with individuals who sought assistance from the Division.

[*Illustrations*]

The following represent some of the varying results achieved from the conferences with business/management, labor and other organizations.

A large interstate trucking company, in keeping with a portion of the conciliation agreement, informed the Division:

"In order that there will be no misunderstanding about our employment procedures in the future, we are having all applicants processed through the terminal manager's office.

"All supervisory personnel have been advised concerning the information contained in your 'Fact Sheet re: Wisconsin's Fair Employment Practices Law'.

"We trust this letter will explain . . . the fact that we . . . do not intend to discriminate against any person."

In addition, the company agreed there would be no polling of workers in the future in order to determine whether they are agreeably disposed to working with Negroes. It has been established hire will be based solely on merit.

* * *

[*Industry*]

In another company with which the Division conferred, the Director of Industrial Relations subsequently confirmed:

"I brought your material to the attention of the respective Division heads of our company. It was discussed in a meeting with them along the lines of your discussion with me. They, in turn, indicated that they would carry the message to appropriate managerial personnel under their respective jurisdiction."

* * *

[*Bank*]

The Division conferred with the president of a local bank regarding fair employment practices. A few days later, as agreed, he walked into a meeting of his organization's operating committee inquiring as to why no Negroes had ever been employed.

His questioning, and the resultant discussion between the president and the operating committee, set the employment machinery in motion. A change in the bank's employment pattern has ensued.

* * *

[*Retail Organization*]

As a result of conference with the legal department of a large retail organization, the following communication was sent to "all managers, State of Wisconsin."

"The Wisconsin Fair Employment Practices Law was amended at the last session of the legislature to authorize the Wisconsin Industrial Commission to enter enforceable orders requiring compliance with fair employment practices. Since violation of the law may now result in liability against——, it is essential that you understand and comply with its provisions.

"The Wisconsin law declares the policy of the state to be the employment of all properly qualified persons regardless of race, creed, color, national origin or ancestry. It forbids discrimination against any employe or applicant for employment on any of the foregoing grounds. Each applicant for employment or each candidate for promotion is to be judged on his individual merits and ability to fill the job.

"While you must not reject a qualified person on any of the grounds specified, you are not required to employ unqualified persons. For example, the fact that you may not have a person of a particular race, creed or color in your organization is not in itself proof that you have discriminated if no such person qualified for the job has applied.

"In order to comply with the letter and spirit of the law you should never inquire of an applicant what his race, creed, color, national origin or ancestry may be. In corresponding with an applicant or speaking to him on the telephone you should confine your inquiries strictly to his qualifications for the position available.

"If at any time you need advice on the application of these rules to a specific set of facts, you should feel free to discuss the matter with your District Manager, or you may write or telephone the company's Manager of Labor Relations in the Law Department, at Chicago."

* * *

[*Hospital*]

A local hospital clarified with the American Society of X-Ray Technicians that it does not refuse opportunity to Negroes as the Society had implied in data sent out by it.

* * *

[*Hotel*]

In a case involving an upstate hotel the Division's letter to the complainant pointed out:

"All the data regarding your separation as an employee at the Hotel ——— has been carefully reviewed, pursuant to determining whether such separation violated our Wisconsin Fair Employment Practices Law.

"Section 111.31 of our law sets forth that it is the policy in this state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their race, creed, color, national origin or ancestry.

"Section 111.36 (4) states that–'it is unlawful for any organization or person . . . or any employment agency which undertakes to procure employees or opportunities to work, to engage in any discrimination' only because of race, creed, color, national origin or ancestry.

"In administering Fair Employment Practices, we have taken the position that in those particular work areas, where it can be done without serious inconvenience to the conduct of business, an employer is expected to accommodate the needs of an employee, or prospective employee, as to religious holiday observance, provided such needs are reasonable. Any unwillingness to accommodate an employee as to religious observance where the request is reasonable, would be contrary to the intents and purposes of our Fair Employment Practices Law.

"However, it is important to note that we

recognize there are work situations in which an employer cannot accommodate religious observances and the more obvious examples are those organizations in which service in some areas is required each day of the week, as in hospitals, hotels, nursing homes, the utilities, etc.

"During your period of employment at the ———Hotel, certain work schedules were required which, because of your religious affiliation, you were unable to abide with.

"In the course of rendering continuous service to the public, it is not unreasonable for a hotel to require service on any given day of the week, and expect that its employees, if the request is reasonable, will cooperate.

"Hotel work forces must necessarily be augmented when conventions or meetings accelerate business. The employer at such time can properly expect employees to cooperate by accommodating the busy period.

"In your case, per our mandate to encourage Fair Employment Practices to the fullest extent practicable, we cannot conclude that your separation from the ——— Hotel violated our FEP Law. We find you were unable to accommodate the reasonable demands which would be made by any hotel organization."

* * *

[*Labor Organization*]

In the summer of 1957, the Industrial Commission undertook a conciliation effort involving Randolph Ross, James Harris, and the Bricklayers, Masons, Marble Masons Protective International Association, Local No. 8.

Such effort succeeded and the two men were admitted to membership in the union on September 24, 1957.

Note: In the case of Ross and Harris v. the Bricklayers' Union, the Industrial Commission, in 1954, found cause to credit the complaint that the union was discriminating against the two complainants on account of color and strove to bring about an adjustment. Such effort failed and on January 19, 1955, a hearing was held. On February 18, 1955, the Industrial Commission found the union discriminating on account of color and recommended that Ross and Harris be admitted into membership. The union did not agree with the Industrial Commission's finding and recommendation, and, therefore, sought relief in the nature of judicial review, in the Circuit Court of Dane County. That Court denied judicial review on the premise that there was then no enabling provision in Wisconsin's Fair Employment Practices Law.

An injunction was then sought in the Circuit Court of Milwaukee County. The union demurred and that court, unlike a court of comparable jurisdiction on January 28, 1954, in the case involving Willie Blue v. the Operative Plasterers' and Cement Masons' Local No. 138, decided it had no authority to enforce a recommendation of the Industrial Commission made pursuant to Wisconsin's Fair Employment Practices Code. This decision was subsequently upheld by the Wisconsin Supreme Court.

For all intents and purposes the Ross-Harris, Local No. 8 matter was thus finally decided. However, with no new issue before it the Industrial Commission nevertheless undertook conciliation in the summer of 1957, and such effort succeeded.

* * *

[*Work With Individuals*]

Very often as the Division probes for data during an interview with an individual who seeks assistance *as a complainant*, it uncovers obvious factors which do not warrant pursuance of the person's experience within the framework of a so-called complaint.

In such instances, and if at all possible, every effort is made to adjust whatever factors block employment. Success in such cases is dependent upon the cooperation of the person. Significantly, this places a good measure of responsibility upon the individual.

In two of such multiple experiences had during the biennial period, the persons complained they were being denied employment because of color.

The young Negro woman had tried unsuccessfully for several years to achieve appointment as a professional in the educational field.

During the Division's first conference with her it was apparent there were multiple reasons, not relating to color, why she was not succeeding in her pursuit of professional employment.

With the assistance of the job applicant, as of August 1, 1957, the Division undertook to elimi-

nate the problems and was therefore able to net trial appointment beginning in September.

Via a probationary period, the employer had a chance to evaluate performance. Such evaluation was good and, as a result, the young woman has been given a permanent appointment notwithstanding the fact that originally, she had been permanently rejected.

* * *

A young Negro man regained employment within an industrial plant notwithstanding his original theory that the respective union was blocking his reemployment and discriminating against him because of his color.

During the first interview, it was quickly noted there were some procedural complications, in no way relating to color, regarding his application for membership in the particular local.

Merely an informal contact with the union by the FEP Division brought about an adjustment, and the man regained employment.

* * *

Speeches, Television, College Classes

17 speeches were had during the biennium.

4 invitations to appear on television were received.

In **5** college classes the subject of Fair Employment Practices was a part of the curriculum.

* * *

[*Meetings*]

In **266** meetings, the Division was represented.

Such meetings relate to various aspects of the Division's general educational program.

("Sec. 111.35 Investigation and study of discrimination. The commission shall:

(1) Investigate the existence, character, causes and extent of discrimination in this state and the extent to which the same is susceptible of elimination.

(2) Study the best and most practicable ways of eliminating any discrimination found to exist, and formulate plans for the elimination thereof by education or other practicable means.

(3) Publish and disseminate reports embodying its findings and the results of its investigations and studies relating to discrimination and ways and means of reducing or eliminating it.

(4) Confer, co-operate with and furnish technical assistance to employers, labor unions, educational institutions, and other public or private agencies in formulating programs, educational and otherwise, for the elimination of discrimination.

(5) Make specific and detailed recommendations to the interested parties as to the methods of eliminating discrimination.")

Among other things, the FEP Division is cooperating with another agency, and business and management, in developing a vocational guidance program geared to the secondary level in one of the local school systems.

It is also cooperating with other agencies, and the University of Wisconsin in developing a human rights program in Milwaukee called Operation Metropolitan. The program is aimed at fostering better understanding among all the people in the community.

* * *

[*Staff—Budget*]

The total program of the Fair Employment Practices Division is carried out by three persons, namely a stenographer and two administrative assistants.

The budget for the fiscal year 1957-58 was $16,480.00, and for the fiscal year 1958-59 was $16,720.00.

HOUSING

Private Housing—New York

The Fair Housing Practices Law of the City of New York became effective on April 1, 1958. 3 Race Rel. L. Rep. 92. On that date, the city's Commission on Intergroup Relations announced its initial policy regarding the enforcement of the new law as being to promote un-

derstanding and co-operation by all elements of the community toward achieving the law's objectives, and to work for conciliation with respect to such specific complaints that might be filed. At the same time, the Commission issued a "citizens guide" to understanding the new law. 3 Race Rel. L. Rep. 566. Following the first three months operation of the law, the Commission issued a two-part quarterly report analyzing complaints received by it during that period. Part I, released July 21, 1958, reported on the background of the complainants, the type of discrimination they had alleged, and the status of complaints. Part II, released August 10, 1958, analyzed characteristics of housing involved in complaints. Both parts are reprinted below.

Part I

During the first quarter of operations under the Fair Housing Practices Law (April 1, 1958 to June 30, 1958) the Commission on Intergroup Relations received 70 verified housing complaints. An analysis of these complaints indicates that the complainants, in general, were better educated and able to afford higher rentals than the average New Yorker.

Of the 70 complaints filed since the effective date of the Fair Housing Practices Law, most (58) alleged discrimination based either upon race or color; four alleged discrimination because of religion (Jewish); two because of national origin (one Italian, the other Chinese), and 6 because of ancestry (all of Puerto Rican background).

A majority of complaints involved Manhattan properties (42); the Bronx ranked second with 11, Brooklyn 10, Queens 7 and none from Richmond. The number of complaints rose each month since the law went into effect. Nineteen were received in April, 23 in May and 28 in June. It is expected, however, that complaints will decrease in number or level off during the Summer months.

Complainant Income

Persons filing complaints were primarily from the middle-income group, and from professional and other white collar occupations with relatively high educational background.

Of 60 complainants reporting family income, 41 earned $65 or more weekly. Of this number 18 earned $100 or more, of whom 7 reported earnings of $200 or more. Two complainants could be described as independently wealthy; one is listed in *Who's Who in America.*

Of 51 Negro complainants reporting income, 34 earned $65 or more weekly. Of these, 15 earned $100 or more and 5 earned $200 or more.

Complainant Occupations

All except 13 of the 65 complainants reporting occupations were in the professional (21), managerial (7), or white collar categories (24). Only one unskilled worker was among the complainants.

Negro complainants reporting occupation (55) included 46 in the professional, managerial and white collar categories and 6 skilled workers.

Complainant Education

The educational level of complainants ranked well above the average for New York City. Forty-two (42) of the 66 complainants reporting education had attended college (39 of these were Negroes); 24 were college graduates (21 Negro), and 57 had completed high school (49 Negro).

Patterns of Discrimination

Complainants reported a number of different devices used in alleged acts of discrimination. The vast majority claimed that they were deliberately given false information (in most cases that the unit in question had already been rented when there was reason to believe this was not true); 16 complaints alleged that outright discriminatory statements were made and 3 others said this was implied. In 6 cases deposits on apartments were returned and 8 others said their applications were either refused or not processed.

Delaying tactics, withholding of services, cancellation of lease, excessive charges and denial of privileges given to other tenants were other charges listed.

The largest number of complainants (25) reported that discrimination was encountered during or immediately following the first personal contact with alleged discriminator. Fourteen (14) said that discrimination followed a telephone contact or written application. In 13 other

cases the alleged discrimination took place after the complainants had looked at the prospective dwelling unit, and in 8 cases, after they had made a deposit on the unit.

In 50 instances the owner of the building and/or the superintendent were named as the "active discriminator"; 20 named a real estate broker or agent; and 10 named the building manager. Others accused of discrimination were identified as a tenant in possession (3), a builder (1), and a relocating company (1). Several complainants named more than one discriminator.

Status of Cases

As of June 30, most of the complaints were in the process of field investigation and negotiations for compliance. Eight cases were ordered for closing. Of these, three were classified as "satisfactorily adjusted" (i.e. unit in question was offered).

Three complaints were withdrawn because complainants were unwilling to pursue the matter further and/or COIR found that the complaints were not justified under the law. Two cases were dismissed for lack of reasonable cause after COIR investigation.

In four pending cases a commitment has been made by the property agent which could result in satisfactory adjustment.

COIR has made every effort to settle complaints at the level of field investigation. To date, four cases investigated have been certified for "reasonable cause." (Evidence of discrimination was found but not adjusted in the field.) The next step in these cases will be conciliation conferences at the Commission office in which an attempt will be made to negotiate a settlement between both parties. If conciliation is not successful at this level the next step would be a formal hearing before three COIR Commissioners.

During most of the three month period, available staff had to be used almost entirely for receiving and processing complaints. Addition of staff members within recent weeks for field investigations and adjustment negotiations will speed up the handling of the large number of cases still in process.

"Tight Market" Affects Operations

Attempts to settle discrimination complaints necessarily have been affected by the tight housing supply, in which a desirable unit is competed for vigorously and is usually off the market within a short period of time. In such cases, it is often difficult to obtain the apartment or dwelling unit in question after COIR has carefully investigated the facts and substantiated the complaint. Therefore, the Commission has developed a set of priorities in its efforts to obtain compliance.

1. Maximum effort will be made to secure the unit sought by the complainant.
2. If this is not possible, agreement will be sought from the agent or owner to make available a similar unit in the same or other properties he controls, or to give the complainant first priority on a waiting list for the next available unit. (In the latter agreement, the Commission will follow up to assure compliance.)
3. If none of the above are possible, negotiations will seek to obtain a commitment from the agent or owner asserting that he will not discriminate in his future operations.

Property Owners Co-operate

On the basis of cases that have been investigated, it is clear that some property owners and agents have discriminated against certain groups in making housing available. It is interesting to note that the majority of the respondents charged with discrimination have denied such intent and have offered various other reasons for the denial or withholding of the unit involved.

On the other hand, there are many signs from the housing industry of willingness to comply with the law.

Management of several large developments has notified their agents to operate in conformance with the law, and the Commission's own investigations have revealed that a significant number of property owners are complying with the law.

Speakers from the Commission have been invited by several real estate groups to explore with them the principles and procedures of the law. These groups have shown every indication that they expect to operate in conformance with the law.

Services to housing management have been provided by COIR in response to requests. For example:

A building superintendent notified the Commission that Negro families had moved into two buildings under his supervision. In one he reported no trouble, but in the other he said a tenant had objected vigorously and was attempting to rouse the other tenants in similar protest. He asked COIR for assistance. A Commission field intergroup relations officer was sent to the property in question and interviewed the objecting tenant. After an informal discussion with the tenant of her responsibilities as a good neighbor, the tenant agreed to stop her protests and no difficulty has been reported in that building since.

In addition, several renting agents and representatives of credit ratings companies have called upon the Commission to advise them in carrying out their operations to conform with the Fair Housing Practices Law. The Commission has been serving in a consultative capacity to many individuals and organizations whose operations affect the renting or sale of properties covered by the law.

Conclusions

A study of the first 70 complaints filed under the Fair Housing Practices Law indicates that the complainants have been drawn largely from the ranks of New York's middle-income families. They are young (58 of the 70 are under 40 years of age); the size of the families is small (56 out of 70 are families of three persons or less); they are well educated, and well able to compete economically for standard housing in the open market.

The patterns of discrimination described by the complainants indicate that there is a tendency away from overt discrimination to various other devices. This is pointed up through investigation which has shown, to date, that most of the respondents charged with discrimination have denied any such intent.

The Commission has found that it has been able to adjust some complaints satisfactorily in the very first stage of its investigation procedures. This experience gives hope that the Commission will be able to carry out its intentions to settle as many cases as possible without recourse to formal hearings or court action.

Because there has been no previous experience in administering legislation dealing with the private housing supply, the Commission cannot make any comparative analysis on the number of complaints filed to date. However, there is no question that COIR's investigations have found evidence of discrimination in the housing market and a number of owners and agents operating in violation of the Fair Housing Practices Law. At the same time it is also evident that a significant number of real estate operators—including important leaders in the industry—are complying with the law or are taking steps to adjust their operations to conform with the principles of the legislation.

Part II

During the first quarter of operations under the Fair Housing Practices Law (April 1, 1958 to June 30, 1958) the Commission on Intergroup Relations received 70 verified housing complaints. An analysis of these complaints indicated that the complainants, in general, were seeking to leave high-density areas to obtain more desirable and higher-priced housing in widely dispersed areas of the city.

Sixty-three (63) of the 70 complaints involved apartments for rent in multiple dwellings. Three complaints involved cooperative apartments, one other a garden apartment, and three did not name specific properties (two of these were against rental agencies and another against a relocation company).

While it must be noted that the number of complaints is too small to show trends or patterns at this point, it is clear that the complainants to date are seeking housing in the general market and are not trying to "inundate" any particular neighborhood or area. More than two-thirds of the apartments involved in the complaints were found through classified newspaper advertisements.

A majority of complainants lived in Manhattan (38); Brooklyn ranks second with 13; Bronx, 9, and Queens, 8. Two came from other cities. Their complaints involved 42 properties in Manhattan, 11 in the Bronx, 10 in Brooklyn and 7 in Queens. There was considerable desire to move from one borough to another. On the whole, more Manhattan residents were looking for apartments in the same borough than were residents of other boroughs.

Rentals

A large majority of those registering complaints were seeking apartments at considerably

higher rentals than they are now paying. At the same time, it appeared that most were moving from and seeking apartments in the rent-controlled market.

Thirty-eight (38) of 49 complainants for whom comparative figures are available were seeking apartments at higher gross rentals than they are now paying. Twenty of these sought apartments at rentals 20 percent or more above their present rentals; 7 were seeking to pay between 40 and 60 percent more, and 6 were willing to pay 90 percent or more than their present rentals.

Eleven complainants sought housing at lower gross rentals than they are now paying, but some of these cases involved the breakup of family units and the consequent need for a smaller apartment.

Information on rentals of desired apartments was available in 56 complaints. Of these, 32 involved apartments in which the monthly rental was $25 or more per room. Within this category, 19 were apartments renting between $30 and $50 per room, and 7 were apartments renting at $50 or more per room.

Based on available data, most of the apartments involved in complaints were rent controlled. In Manhattan, for example, 60 out of 69 buildings presently lived in or desired were so covered.

Type of Housing Sought

Practically all housing sought by complainants was in older buildings with vacancies brought about through normal turnover. Only two complainants were seeking apartments in buildings being rented for the first time.

An analysis of the age of properties indicated that 11 of the apartments desired by complainants were in buildings constructed after World War II. An additional twenty-eight were built between 1900 and 1940, while 25 were built before 1900. However, of the pre-1900 category, 16 had undergone one or more major alterations, and rentals in these buildings ranged as high as $76 per room. Of the buildings constructed between 1900 and 1940, 12 had undergone one or more major alterations and 10 were in a rental range of $25 or more per room. Judging by rentals and alterations, it appears that a considerable number of the apartments in the older buildings were of desirable quality.

Location of Housing

A survey of the location of apartments now occupied by complainants as compared to the apartments they were seeking to occupy shows that these people are willing to move considerable distances and to other areas of the city.

Of 62 complainants seeking to change their residence (the balance of complaints involved discriminatory treatment in present residence or did not specify specific properties), 44 were looking for apartments located a mile or more from their present home. Of these, 21 were looking for apartments in a different borough from the one in which they now live. There were complainants from every borough (exclusive of Richmond) seeking apartments in other boroughs.

The present residences of complainants are located largely in areas of high population density, some of which have heavy minority concentrations. The largest number of Manhattan complainants (28 out of 38) now reside between West 60th Street and West 180th Street. Of this group, about half now live in the area generally described as the West Side (60th to 110th Street) and the balance are about equally distributed in the West Harlem, Washington Heights and Morningside Heights areas.

Of 13 complainants living in Brooklyn, 9 reside in an area embracing Brownsville, East New York, Bedford-Stuyvesant and Williamsburg. In the Bronx, 4 out of 9 in Morrisania, and in Queens, 5 out of 8 live in Jamaica.

The properties sought by the complainants were widely dispersed throughout the city, exclusive of Staten Island. Desired apartments in Manhattan were located in virtually every section of the island. Manhattanites in general sought to remain in Manhattan, but very few sought housing in their immediate neighborhood. More than half of those now living on the West Side sought other apartments in the same general area. Eight Manhattanites, however, were looking for housing in other boroughs. The location of apartments sought in other boroughs also indicated a general dispersion, with no observable patterns of concentration.

Conclusions

An analysis of the property characteristics involved in complaints during the first quarter of operation under the Fair Housing Practices

Law indicates that minority families are seeking housing in the general market in widely dispersed sections of the city, and are willing to pay higher rentals.

It must be noted, however, that because the number of cases analyzed is relatively small for statistical purposes, any observations or conclusions made as a result of this report must be tentative.

Complainants showed a general willingness to pay higher rentals. Almost 4 out of 5 complainants from whom comparative data was obtainable said they were seeking apartments with higher gross rentals. Some of these apartments involved increases of 90 percent or more.

Few complainants sought housing in their immediate neighborhood and many sought homes in other boroughs. With the exception of Staten Island, complainants from every borough were seeking housing in every other borough.

Most of the desired apartments were located through classified newspaper advertisements.

In general, housing involved in complaints represented older, rent-controlled properties which constitute the most sought after and most competitive segment of the market.

NATIONAL GUARD
Federal Orders—Georgia

Governor Griffin of Georgia has ordered the state militia not to obey any directive from the United States Government until its constitutionality is certified by the governor.

EXECUTIVE ORDER

BY THE GOVERNOR:

Ordered: That no order, command or directive from the Government of the United States or any officer thereof to the Militia of the State of Georgia will be obeyed until the Governor of Georgia certifies in writing to the Adjutant General of the State of Georgia that such order, command or directive is constitutional.

This the 30th day of June, 1958.

s/ Marvin Griffin
GOVERNOR

BY THE GOVERNOR:
s/ Tom Gregory
Secretary of Executive Department

ATTORNEYS GENERAL

INDIANS
Tax Exemptions—New York

The New York Thruway Authority requested the opinion of that state's attorney general as to the validity of the position taken by certain Indian nations that they were entitled by statute to an absolute exemption from tolls for use of the Thruway. The attorney general's opinion, reproduced below, stated that the section of the Indian Law (dating back to 1813) relied upon by the Indians in this situation had been superseded by statutes giving the Authority the power to fix and collect charges for use of the Thruway.

May 23, 1958

New York State Thruway Authority
Delaware Plaza
Elsmere, New York

Attention: Hon. Brendan P. O'Carroll,
Assistant Counsel.

Gentlemen:

Your letter of May 7, 1958 advised me that the Indians of the Six Nations have adopted a policy of refusing to pay to the Thruway Authority any tolls for passage on the Thruway and that they cite an absolute exemption in Indian Law, § 15.

Section 15, which deals with "Freedom from toll and ferriage", reads as follows:

> "The Indians of the Six Nations may pass and repass free of toll and ferriage, at all seasonable times of the day, on any turnpike road, which shall have been established since April sixth, eighteen hundred and three, or which shall hereafter be established, leading from or through the town of Canandaigua to Buffalo Creek or its vicinity, and over any toll bridge between those places, and at the ferry across the Niagara river at or near Black Rock, or at such place or places in its vicinity where any ferry shall have been established since such time, or shall hereafter be established."

The quoted section is derived from the Indian Law of 1892 (ch. 679) and its origin dates back to Revised Laws of 1813, ch. 92, § 43. The date set forth in the section, April 6, 1803, is of peculiar significance because it was at that time that the Legislature created three turnpike roads which affected the area in question. (Canandaigua & Bath Turnpike, Act passed April 2, 1803, L. 1803, ch. 77; Great Western Turnpike, Act passed April 4, 1803, L. 1803, ch. 84; Chenango Turnpike Act passed April 4, 1803, L. 1803, ch. 85.) It is thus obvious that in enacting the original of Section 15 of the Indian Law the Legislature intended to permit the Indians to travel toll-free over these privately-owned turnpikes or similar private turnpikes which would be established at a later date. Certainly, the Thruway cannot properly be compared in this respect with the turnpikes of the nineteenth century.

Assuming, however, purely for the sake of argument, that no distinction can properly be drawn in the respect set forth above between the Thruway Authority and the old Turnpike companies, nevertheless the Legislature has expressly declared that Indian Law, § 15 does not apply to the Thruway. In Public Authorities Law (Consolidated Laws, ch. 43-A), Article 2, Title 9, it is provided as follows:

> "§ 354. *Powers of the Authority.*
> Except as otherwise limited by this title, the authority shall have power
> * * *
> 8. Subject to agreements with noteholders and bondholders, to fix and collect such

> fees, rentals and charges for the use of the thruway or any part thereof necessary or convenient, with an adequate margin of safety, to produce sufficient revenue to meet the expense of maintenance and operation and to fulfill the terms of any agreements made with the holders of its notes or bonds, and to establish the rights and privileges granted upon payment thereof; * * * * *."

Pursuant to the Authorization above set forth the Thruway Authority has fixed a schedule of tolls to be collected for use of the Thruway; no exemption has been given to the Indians. Public Authorities Law, § 375, which is the final section in Title 9, provides:

> "In so far as the provisions of this title are inconsistent with the provisions of any other act, general or special, the provisions of this title shall be controlling."

Thus, it is obvious that Indian Law, § 15, has been superseded by Title 9 of the Public Authorities Law insofar as the Thruway is concerned.

Since the exemption of the Indians is purely statutory in origin, having no basis whatever in treaty provision, and since the statutory provision has been superseded, it would appear that the Authority may legally exact tolls from the Indians of the Six Nations.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

REFERENCE

Anti-Discrimination Commissions

I. Introduction

A. Source of State's Authority

Since the year 1945, eighteen states and numerous cities and counties have created specialized commissions with the function of eliminating racially discriminatory practices in certain areas of the social structure of the United States.[1]

This trend in the field of human relations proceeds upon an extension of the exercise of

1. The basic statutory references to the anti-discrimination statutes for the eighteen states are as follows:
Colo. Rev. Stat. Ann. §§ 80-24-1 to -8 (Supp. 1957).
Conn. Gen. Stat. §§ 7400-7 (1949).
Ill. Ann. Stat. c. 127, §§ 214.1-.5 (Smith-Hurd 1953).
Ind. Ann. Stat. §§ 40-2301 to -2306 (1952).
Kan. Gen. Stat. Ann. §§ 44-1001 to -1008 (Supp. 1957).
Md. Ann. Code art. 49B, §§ 1-10 (1957).
Mass. Ann. Laws c. 6, §§ 17, 56 (1952); Mass. Ann. Laws c. 151B, §§ 1-10 (1957); Mass. Ann. Laws c. 151C, §§ 1-5 (1957).
Mich. Stat. Ann. §§ 17.458(1)-(11) (Supp. 1957).
Minn. Stat. Ann. §§ 363.01-.13 (1957).
Mo. Sess. Laws 1957, S.C.S.H.B. 125, at 299.
N.J. Stat. Ann. §§ 18:25-1 to -28 (Supp. 1957).
N.M. Stat. Ann. §§ 59-4-1 to -14 (1953).
N.Y. Executive Law §§ 290-301; N.Y. Educ. Law § 313.
Ore. Rev. Stat. §§ 651.010-.030, 659.010-.990 (1957).
Pa. Stat. Ann. tit. 43, §§ 951-963 (Supp. 1957).
R.I. Gen. Laws Ann. §§ 28-5-1 to -39 (1956).
Wash. Rev. Code §§ 49.60.010-.320 (1957).
Wis. Stat. §§ 15.85, .855 (1957) (Governor's Commission on Human Rights); Wis. Stat. §§ 101.02-.06, 111.31-.37 (1957) (Industrial Commission).

state police power, either directly employed by the state itself or delegated by the state to its local governments. Police power legislation is based upon the responsibility of the state to provide for the protection of public health, education, and welfare, and in this particular area it has been asserted that discriminatory practices not only deprive individual victims of equal opportunities, but also may adversely affect the public generally (see Shaffer, *Residential Desegregation*, 1 Editorial Research Reports No. 3, at 43-44, Jan. 15, 1958). Thus, the Connecticut Civil Rights Commission has recently pointed out that because of discriminatory rental charges, members of minority groups have often become public welfare charges, and thereby personal discrimination results in a drain on public funds.

New York's anti-discrimination legislation, the first enacted with provision for its administration by an especially created agency, has served as a model for subsequent statutes in this field; therefore, its declaration of policy, being representative, is set forth as follows:

> "This article shall be known as the 'Law Against Discrimination.' It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights; and the legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is hereby created with power to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement and in publicly-assisted housing accommodations because of race, creed, color or national origin, and to take other action against discrimination because of race, creed, color or national origin, as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes." N.Y. Executive Law § 290.

The problem areas of concern are employment, housing, public accommodations, and edu-

Table I

Problem Areas [1]

STATE		Employment	Public Accommodations	Housing	Education
Colorado		x	x		
Connecticut		x	x	x	x
Illinois		x	x	x	x
Indiana		x			
Kansas		x			
Maryland		x	x	x	x
Massachusetts		x	x	x	x
Michigan		x			
Minnesota [2]	FEPC	x			
	Gov's Com'n	x	x	x	x
Missouri		x	x	x	x
New Jersey		x	x	x	x
New Mexico		x			
New York		x	x	x	x [3]
Oregon		x	x	x	x [4]
Pennsylvania		x			
Rhode Island		x	x	x	
Washington		x	x	x	x
Wisconsin [2]	Gov's Com'n		x	x	x
	Ind'l Com'n	x	x	x	x

1. Commissions have indicated concern in some problem areas not expressly covered by statute.
2. This state has two commissions operating in the areas indicated.
3. Enforced by the Department of Education.
4. Vocational, professional, trade schools only.

cation. Not all of the commissions operate in each of these areas, the present major emphasis being placed on discrimination in employment. See Table I.

Currently there are two basic approaches to the problem of eliminating discrimination—education and enforcement. By "education" is meant the process of informing the public of the scope of the protection against discrimination afforded by the law and of persuading the public to avoid discriminatory practices, while by "enforcement power" is meant the authority to issue an order requiring one who has been found to be acting in a discriminatory manner to cease and desist from such unlawful practice. Five of the states are seeking to create an anti-discrimination atmosphere by education alone, while the remaining thirteen are employing enforcement procedures when persuasion efforts fail.

B. Purpose of Study

It is the purpose of this study to explore the various state anti-discrimination commissions from the standpoint of establishment, structure, purpose, legislative scope, function, and achievement, and to consider the relations between the state and local commissions. In this article the term "commission" is employed to include any titles by which the several administrative bodies are officially designated, and it is used interchangeably with the terms "agency," "board," or "committee." General statements are of course limited to the group of states indicated in footnote 1.

The federal commission created by the Civil Rights Act of 1957 [2 Race Rel. L. Rep. 1011-15 (1957)] is not included in this study. Reference to the Act will show that this federal commission is not closely comparable to the state commissions studied here. Apart from the investigation of certain voting complaints the Commission on Civil Rights is directed to "study and collect information" and "appraise law and policy in the broad field of "equal protection."

II. Basic Structures of Commissions

A. Establishment, Composition, Tenure, and Power

Detailed factors concerning state commissions, such as statutory authorization, dates of establishment, membership statistics, and salaries, are best presented in tabular form. For this reason Table II is used as a means of presenting the statistical information concerning the basic structures of the state commissions. Only the extremes of the variances will be pointed out here. All of the presently operating state agencies were originated within a period of twelve years, the New York commission having been established first, in 1945, and that of Missouri most recently, in 1957. Commission membership ranges from three on Massachusetts' Commission Against Discrimination to the thirty-five on Wisconsin's Governor's Commission on Human Rights. The commissioners serve terms varying from two to six years. Almost uniformly the commissioners are selected by the governors of the several states, and ten states specifically require that the selections be approved by the state senates. All eighteen states make some general provision for reimbursement of necessary and proper expenses incurred by the commissioners, and in ten states the commissioners are compensated for their services on either an annual or a per diem basis.

B. Personnel

Eleven of the state statutes have some specific requirements relating to commission membership. Colorado, Michigan, and Pennsylvania statutes stipulate the political make-up of their individual commissions. Of Colorado's seven members not more than four can be of the same political party. Michigan's requirement is that not more than three of its six commissioners can be of the same political party, the remainder representing the opposite major party. Not more than five of Pennsylvania's nine commissioners are to be from the same political party. It is obvious that political affiliations may also loom large in the selection of commissioners in states whose statutes do not have any such specific requirements. This result is a natural consequence of the appointive powers vested in the several governors. It has been observed, however, that the effectiveness of a commission is

Table II: Basic Structures

STATE	Date Established	Members	Selection[1]	Term	Compensation	Enforcement Powers
Colorado	1951	7	G/S	4	—0—	Yes
Connecticut	1947	10	G	5	$25 per diem during hearings	Yes
Illinois	1947	20	G	2	Only Chairman	No
Indiana[4]	1945	8 plus Lt. Gov.	G (8)		—0—	No
Kansas	1953	5	G	4	—0—	No
Maryland	1951	9	G/S	6	—0—	No
Massachusetts	1946	3	G/S	3	$6000, Chairman $5000, Commissioners	Yes
Michigan	1955	6	G/S	3	$25 per diem	Yes
Minnesota FEPC	1955	9	G/S	5	—0—	Yes[2]
Minnesota Gov's Com'n[3]	1955	28	G		—0—	No
Missouri	1957 (terminates 6–30–61)	11	G	3	—0—	No
New Jersey	1945	7 plus Commissioner of Education	G/S(7)	5	—0—	Yes
New Mexico	1949	3 plus 2 ex officio	G/S(3)	3	—0—	Yes
New York	1945	5	G/S	5	$13,700	Yes
Oregon	1949	Labor Commissioner plus others	Elected	4	Labor Commissioner $11,500	Yes
Pennsylvania	1955	9	G/S	5	$15 per diem	Yes
Rhode Island	1949	5	G/S	5	Not more than $2500	Yes

(Continued on following page)

Table II: Basic Structures (Cont.)

STATE		Data Established	Members	Selection[1]	Term	Compensation	Enforcement Powers
Washington		1949	5	G	5	$20 per diem	Yes
Wisconsin	Gov's Com'n	1947	35	G	3	—0—	No
	Ind'l Com'n	1945	3	G/S	6	$14,000, Chairman $13,000, Comm'ner	Yes

1. G, Governor; G/S, Governor with the approval of the Senate.
2. Board of Review actually issues cease and desist orders.
3. Formerly the Governor's Interracial Commission which was established in 1943.
4. Commission established as advisory board to Commissioner of Labor.

not determined by political factors, but rather by the quality of individuals selected to serve as commissioners.

Colorado, Minnesota (Fair Employment Practices Commission), and Missouri statutes express geographical limitations. Colorado's provision is rather loose in stating that geographical representation shall be provided insofar as is practicable. Minnesota and Missouri require one commissioner from each congressional district of the state.

Kansas has provisions relating to broad occupational representation on its commission. Of the five members of the Kansas commission two must represent labor, two must represent industry, and one must represent the public at large. At least one of the Minnesota commissioners must be an attorney at law.

Some commissioners are such by virtue of the public offices which they hold. Indiana's nine member commission is comprised of four Senators, four Representatives, and the Lieutenant-Governor who serves as chairman. The Attorney-General and Labor Commissioner serve along with three others on the New Mexico Fair Employment Practice Commission.

C. Budgets

The extent of a commission's operations necessarily depends to a large extent upon the funds made available to it. There is great variation among the individual states in this respect, ranging from New York's $636,668 to New Mexico's $2,000. Following New York are Michigan ($137,218), New Jersey ($116,940), Pennsylvania ($112,500), Connecticut ($93,000), Massachusetts ($89,000), Colorado ($43,638), Wisconsin ($43,417.27: Governor's Commission on Human Rights—$26,697.27; Industrial Commission—$16,720), Illinois ($42,500), Washington ($39,705), Rhode Island ($37,495), Minnesota ($32,000: Fair Employment Practices Commission), Oregon ($19,436.50), Kansas ($17,500), and Maryland ($17,200). These figures are the latest available for the states enumerated; however, some of them refer to the 1957-1958 fiscal year while others refer to 1958-1959. Indiana and Missouri have been omitted since no information is available concerning them.

Several approaches may be used in analyzing these figures. When translated into proportions of total state expenditures, and into per capita expenditures, the figures become more meaningful. In terms of the total budget of the state, Rhode Island spent the greatest amount for its anti-discrimination activities. Connecticut and New York followed in that order. Rhode Island's expenditures were also the highest per capita: 4.5 cents per citizen. Connecticut and New York were next, spending 4.03 cents and 3.93 cents per citizen, respectively. See *Fair Employment Practices at Work in Twelve States* 6-7, 29-31 (1958), for additional statistical information.

The significance of appropriations in administration is clearly indicated by the following letter from New Mexico's Fair Employment Practices Commission, published in its 1957 Annual Report 9, addressed to the Governor and the members of the Legislature:

"Albuquerque, New Mexico
November 1, 1957

To: His Excellency, the Governor
The Honorable Members of the Legislature

Gentlemen:

The New Mexico Fair Employment Practices Commission has, since its inception, been given only token financial support. Twice, in my term as Chairman, your Commission has asked the Legislature for an increased appropriation and twice our request has been denied. Twice your Commission has appeared before the Governor's Finance Committee with the same request and both times our request has been denied.

Your Commission can neither make an adequate investigation of complaints lodged with it nor can it carry on an adequate program acquainting the public with its existence and its readiness to serve, except as it is given more adequate financial resources, commensurate with the potential service it might render the people of our state.

Acting on this conviction your Commission reiterates recommendations offered in its last Annual Report:

1. That we secure the services of an adequately trained individual who will give full time to making careful investigations of all complaints filed with the Commission.
2. That through the aforementioned staff person we carry on a carefully planned program of education designed to reach all the schools of our state, and such other representative groups of citizens as time and means may permit.

To make possible the foregoing we request an operating budget of $15,000 per year for the immediate future. We feel strongly that the time for token efforts is past. Either we must be given the resources to move forward with imagination and courage to discover and eliminate the forces of ignorance, prejudice and discrimination which are so detrimental to human well-being or we must continue as a "token body" to salve our public conscience. Gentlemen, the choice is yours.

Clarence E. Parr,
Chairman"

III. Scope of Authority

A. Employment

All of the state commissions are concerned with discrimination in employment. Although there has been legislation forbidding discrimination in public accommodations for many years, employment was the first area to receive the attention of specialized anti-discrimination commissions either with or without enforcement powers.

1. Grounds of Discrimination

Discrimination in employment which is based on race, creed, color, or national origin is condemned by the states included in this study. Missouri's statute defines discrimination as "any unfair treatment based on race or national ancestry," and several other states add "ancestry" to their lists of discriminatory bases. Discrimination based on "age" is covered by the Pennsylvania, New York, and Massachusetts law, [see 2 Race Rel. L. Rep. 736 (1957) for Massachusetts Case No. AVI-1-A, concerning age discrimination in employment], while sex discrimination is forbidden by Oregon. New Jersey provides that there be no discrimination based on "liability for service in the armed forces of the United States." According to the N.J. Stat. Ann. § 18:25-5(ff) (Supp. 1957) this means:

" . . . subject to being ordered as an individual or member of an organized unit, into active service in the armed forces of the United States by reason of membership in the National Guard, naval militia or a

reserve component of the Armed Forces of the United States or subject to being inducted into such Armed Forces through a system of national selective service."

2. Employers Included

The statutes are designed to encompass both public and private employment situations. Limitations of note concern the minimum number of employees needed before the private employer is included within the coverage of the statute and the exclusion of certain non-governmental organizations. The minimum number of employees needed for coverage is four in Rhode Island and New Mexico, five in Connecticut, six in Colorado, Indiana, Massachusetts, New Jersey, New York, and Oregon, eight in Kansas, Michigan, Minnesota, and Washington, and twelve in Pennsylvania. Non-governmental organizations generally exempted are social clubs, and fraternal, charitable, educational, or religious associations not organized for profit. Indiana, Kansas, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Wisconsin statutes follow this general statement; however, neither New Mexico nor Wisconsin includes the terms "charitable" or "educational," while both Kansas and Rhode Island add the term "sectarian." Rhode Island's statute qualifies its exemption and thus brings "labor organizations and non-sectarian corporations or organizations engaged in social service work" within its jurisdiction. In addition to the above listed states, Colorado and Pennsylvania exclude religious associations which do not receive support from the government; Pennsylvania also adds "charitable or sectarian corporations or associations" in its statement of organizations not covered by the statute. When religion is a bona fide occupational qualification for employment, Minnesota's statute exempts those religious or fraternal organizations which select their employees on that basis.

3. Employees Excluded

The term "employee" is defined by most of the acts to exclude certain individuals or groups. Those generally excluded are domestic workers and individuals employed by parents, spouse or child. Of the fifteen statutes which define the term "employee," only Wisconsin does not exclude domestic workers from its jurisdiction, while only Colorado and Michigan do not exclude those employed by members of their immediate families.

4. Unlawful Discriminatory Practices

The statutes are generally uniform in defining what employment practices are unlawful. Employers, labor organizations, and employment agencies are specifically mentioned in this connection, and certain practices on the part of each are indicated as constituting unlawful discrimination, "unless based upon bona fide occupational qualifications." Colorado, Minnesota, and Pennsylvania also provide that there is no unlawful employment practice where national or state security regulations are concerned.

An employer's refusal to hire or employ an individual because of his race, creed, color, or national origin (other grounds of discrimination are discussed above) constitutes an unlawful practice, as does his discharging or barring one from employment on any of those grounds. Likewise, to discriminate against a person in the matter of compensation, or terms, conditions, and privileges of employment is a violation of the statutes. Pennsylvania's statute specifies, however, that its provisions shall not apply to:

> "(1) [T]ermination of employment because of the terms or conditions of any bona fide retirement or pension plan,
> "(2) [O]peration of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement,
> "(3) [O]peration of the terms or conditions of any bona fide group or employe insurance plan." Pa. Stat. Ann. tit. 43, § 955(a) (Supp. 1957).

It is an unlawful discriminatory practice for a labor organization to exclude certain applicants from membership, to expel certain individuals from membership, or to discriminate in any way against any member, employer, or employee on account of race, creed, color, or national origin. Some statutes are more specifically phrased, providing that it is a violation to discriminate against an applicant for membership or a member with respect to hire, tenure, apprenticeship, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

An employment agency is guilty of unlawful practice when it fails or refuses, on the basis of race, creed, color, or national origin, to classify properly or to refer an individual for em-

ployment, as well as when it complies with an employer's request for a referral of job applicants if the request indicates either directly or indirectly that race, creed, color, or national origin will be considered in filling vacancies.

Relative to prospective employment, it is unlawful for an employer or an employment agency to advertise, publish, or inquire so as to express, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, or national origin. However, the Washington statute states that advertising in a foreign language is not prohibited. Michigan and Pennsylvania prohibit an individual seeking employment to publish or advertise his own race, creed, color, or national origin or to express any preference concerning the race, creed, color, or national origin of any prospective employer. Both states add "ancestry," while Pennsylvania also includes "age."

The statutes are also designed to protect a person, other than the individual discriminated against, who merely opposes the practices forbidden, and a person who has filed a complaint, testified, or otherwise assisted in a proceeding under the anti-discrimination law. It is unlawful for any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against such person.

Eleven states (Colorado, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington) stipulate that it is unlawful for any person to aid, abet, incite, compel, or coerce another to engage in an unlawful employment practice, or to hinder or prevent compliance with the provisions of the statute or any order issued thereunder, or to attempt to commit an act which is an unlawful employment practice.

Only the Michigan statute expresses any limitation concerning the name under which an employment agency may operate. Any connotation of discrimination as to race, creed, color, ancestry, or national origin is forbidden, except that agencies already in operation were allowed to continue to use such a name, provided, however, that under its name it would display a statement to the effect that its services were rendered without regard for one's race, creed, color, ancestry, or national origin.

Michigan, Pennsylvania, and Rhode Island statutes prohibit policies of employers, labor organizations, or employment agencies which deny or limit employment or membership opportunities through a "quota system"—that is, the establishment of a maximum number of individuals representing a certain race, creed, color, or national origin which will be employed or admitted to membership.

Since the Illinois, Kansas, and Missouri commissions do not have enforcement powers, and their statutes are of a general nature, they do not deal with detailed listings of unfair discriminatory practices. The Kansas law, for example, merely states that its commission is empowered "to discourage discrimination in employment because of race, religion, color, national origin or ancestry, either by employers, labor organizations, employment agencies or other persons as hereinafter provided." Kan. Gen. Stat. Ann. § 44-1003 (Supp. 1957).

B. Housing

1. Grounds of Discrimination

As in employment practices, discrimination in housing accommodations is unlawful if its basis is the race, creed, color, or national origin of an individual. New Jersey's provision, regarding employment, that there can be no discrimination based on "liability for service in the armed forces of the United States" is inapplicable to housing, as are the "age" provisions of the Massachusetts, New York, and Pennsylvania employment laws and the "sex" provision of the Oregon employment statute.

2. Type of Housing Included

Twelve state commissions are concerned with the general area of housing, and of this number eight have powers of enforcement. Thus far, no state operates in the realm of private housing; however, New York City has recently entered this field (see discussion *infra*). As in employment, the anti-discrimination movement apparently originated in "public housing"—i.e., housing constructed and/or financed entirely by public funds—, but the statutes have generally come to include also "publicly-assisted housing"—i.e., housing financed in whole or in part by a state or federal loan, whether or not secured by a mortgage (see Shaffer, *Residential Desegregation*, 1 Editorial Research Reports No. 3, at 45, Jan. 15, 1958). Six states (Connecticut, Massachusetts, New Jersey, New York, Washington, and Wisconsin) are concerned with both

public and publicly-assisted housing, while Rhode Island is concerned only with public housing and Oregon apparently only deals with publicly-assisted housing. Although there is a distinction between "public" and "publicly-assisted" housing, it is not consistently observed in the legislation now in force. Thus, the New York statute includes expressly "public housing" in its definition of "publicly-assisted housing accommodations".

Under this New York statute, publicly-assisted housing also includes: (1) housing companies which are supervised by the commissioner of housing; (2) housing which is constructed after July 1, 1950, and which is exempt from some or all state or local taxes, or which is constructed on land purchased below cost from the state or any of its political subdivisions in accordance with the Federal Housing Act of 1949, or which is constructed on property which is condemned for such construction by the state or local government, or which receives some financial assistance from the state or one of its political subdivisions; (3) housing in a multiple dwelling which is acquired, constructed, rehabilitated, repaired, or maintained after July 1, 1955, by a loan insured or guaranteed by the federal, state, or local government, during the period of the loan, the guaranty or insurance, and (4) housing in groups of ten or more contiguous housing accommodations offered for sale by one who owns or controls it subject to the limitations stated above in (3) or subject to an outstanding commitment of these same conditions. N.Y. Executive Law § 292(11).

While Massachusetts' law does not use the term "public housing," as does New York's, public housing appears to be included within the definition of the coverage of the statute, which is couched in the following terms:

> "The term 'publicly-assisted housing accommodations' includes all housing accommodations in
>
> "(a) housing constructed after July first, Nineteen hundred and fifty, and
>
> "(1) which is exempt in whole or in part from taxes levied by the commonwealth or any of its political subdivisions; . . ." Mass. Ann. Laws, c. 151B § 1(10) (1957).

New Jersey's definition of a "publicly-assisted housing accommodation" includes "all housing built with public funds or public assistance . . . ." N.J. Stat. Ann. § 18:25-5(k) (Supp. 1957).

Although it appears that in actual practice Wisconsin's Industrial Commission handles only cases of unfair employment practices, whereas Wisconsin's Governor's Commission on Human Rights is concerned with the other problem areas of discrimination, there is a provision in the fair employment law which prohibits discrimination "in the fields of *housing*, recreation, education, health and social welfare." (Emphasis added.) 1 Wis. Stat. § 111.32(5)(1957). Section 111.36 of Wisconsin's law indicates that the Industrial Commission is empowered to enforce the law when it finds that there has been "discrimination", not limited to "discrimination in employment" only.

Connecticut's prohibition against discrimination in housing is found in the Public Accommodations Statute, which defines "a place of public accommodation, resort, or amusement" as:

> ". . . any establishment, including, but not limited to, *public housing projects and all other forms of publicly assisted housing*, which caters or offers its services or facilities or goods to the general public. . . ." (Emphasis added.) Conn. Gen. Stat. § 3267(d) (Supp. 1955).

Connecticut's public accommodations law came into focus in *McKinley Park Homes, Inc. v. Commission on Civil Rights*, 2 Race Rel. L. Rep. 160 (1957). There a Negro complainant alleged that refusal to rent an apartment to him on the basis of his color or race constituted discrimination by defendant, a lessor of privately-built apartments. Special tax abatements from Hartford, Connecticut, had been obtained for these apartments, which therefore allegedly came within the meaning of "publicly-assisted housing." Upon investigation of the complaint, and a hearing, the Commission entered a cease and desist order, from which appeal was taken to a state court. Since complainant's argument was merely based on "suspicion," the court held that the Commission's order must be dismissed because of insufficient evidence. Consequently, the court did not pursue the issue of whether McKinley Park Homes, Incorporated, constituted "publicly assisted housing" so as to come within the purview of the Public Accommodations Statute.

Similarly, Rhode Island's definition of "a place

of public accommodation, resort or amusement" includes a provision prohibiting discrimination in housing, but it does not appear to be as broad as Connecticut's law since it includes only "public housing projects." R.I. Gen. Laws Ann. § 11-24-3 (1956).

Washington and Oregon, in contrast to New York, New Jersey, and Massachusetts, do not include "public housing" in their definitions of "publicly-assisted housing," or, as Oregon phrases it, "housing benefiting from public aid." This omission is noted by observing the following language of the Washington definition, which is quite similar to that of Oregon:

> "'Publicly-assisted housing' includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof; . . ." Wash. Rev. Code § 49.60.040 (1957), 3 Race Rel. L. Rep. 461.

To this definition Oregon only adds a statement which encompasses housing units which are "located on land owned or assembled into a parcel for housing units by a governmental body." Ore. Rev. Stat. § 659.034(2) (1957).

However, Washington's Board Against Discrimination has stated that this statute is intended to include "public housing" also. Therefore, it seems reasonable to assume that Oregon's law is to receive the same construction as Washington's in this regard. Oregon will be an exception to the general trend of covering "public" housing before "publicly-assisted" housing, if it actually does not intend the inclusion of "public" housing in its definition.

3. Private Housing

Only New York City has legislated in the area of strictly private housing in order to eliminate discriminatory practices. On December 5, 1957, the New York City Council passed the Sharkey-Brown-Isaacs Law, effective April 1, 1958, reciting the following policy:

> "In the City of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, religion, national origin and ancestry, many persons have been compelled to live in circumscribed sections under substandard, unhealthful, insanitary and crowded living conditions because of discrimination and segregation in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, intergroup tension, loss of tax revenue and other evils. As a result, the peace, health, safety and general welfare of the entire city and all its inhabitants are threatened. Such segregation in housing also necessarily results in other forms of segregation and discrimination which are against the policy of the state of New York. It results in racial segregation in public schools and other public facilities, which is condemned by the constitutions of our state and nation. In order to guard against these evils, it is necessary to assure to all inhabitants of the city equal opportunity to obtain living quarters, regardless of race, color, religion, national origin or ancestry.
>
> "It is hereby declared to be the policy of the city to assure equal opportunity to all residents to live in decent, sanitary and healthful living quarters, regardless of race, color, religion, national origin or ancestry, in order that the peace, health, safety and general welfare of all the inhabitants of the city may be protected and insured." N.Y.C. Admin. Code c. 41, tit. X, § X41-1.0(a) (1957), 3 Race Rel. L. Rep. 92 (1958).

By prohibiting discrimination in the selling or renting of housing accommodations in multiple dwellings and in one and two family homes which are sold in projects of ten or more contiguous lots, the ordinance is aimed toward the general housing market of New York City.

According to the report of the Commission on Law and Social Action of the American Jewish Congress, "The Sharkey-Brown-Isaacs Bill" 8 (1957), multiple dwellings in New York City constitute approximately seventy percent of the total housing market. As defined in N.Y. Mult. Dwell. Law § 4(7) a "multiple dwelling" is:

> "a dwelling which is either rented, leased . . . or is occupied as the residence or home of three or more families living independently of each other. . . . A 'multiple dwelling' shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes . . ."

The law exempts religious institutions which provide housing accommodations for members of their own faith [N.Y.C. Admin. Code c. 41, tit. X, § X41-1.0 (b)(2) (1957)] and persons who sub-let rooms in their own apartments [N.Y.C. Admin. Code c. 41, tit. X, § X41-1.0 (g) (1957)].

Those sponsoring the bill apparently were willing to sacrifice procedural efficiency in order to secure passage of the substantive law. The usual simple procedure of processing complaints through an administrative commission which ultimately has the power to issue a cease and desist order or to dismiss the complaint was modified before the bill was finally passed. The modification resulted in a procedure very similar to that employed by the Minnesota Fair Employment Practices Act. Thus, the city commission cannot issue an order which is enforceable, but merely investigates and then conciliates, after which it refers the complaint to the Fair Housing Practices Panel, an additional agency established to act as a final screen before the initiation of a court action in the matter. From the twelve-member panel appointed by the mayor, a three-member Fair Housing Practices Board is selected to review cases of alleged discrimination. The Board, empowered to hold hearings and to issue subpoenas, may direct the New York City Corporation Counsel to bring equitable proceedings in the supreme court in the city's name, if a hearing discloses that court action is warranted. A provision for criminal penalties was eliminated before the passage of the bill.

The validity of the Sharkey-Brown-Isaacs Law will probably be contested on the basis of the due process and equal protection clauses of both the federal and state constitutions. However the recital of policy, *supra*, indicates that the law was enacted pursuant to authority delegated by the state to New York City, thus presenting a clash between the due process arguments and the "police power" contention. Since there is an apparent tendency on the part of both federal and New York state courts to act in deference to "police power" legislation which is reasonably related to a valid legislative object, it is probable that the law will be upheld, especially in view of the cases which indicate that a community's welfare is enhanced by the elimination of discrimination in the area of housing. See *Berman v. Parker*, 348 U.S. 26 (1954); *Crommett v. City of Portland*, 150 Me. 217, 107 A.2d. 841 (1954); Comment, 58 Colum. L. Rev. 728 (1958).

If it is argued that equal protection guarantees are violated by the ordinance because one and two family homes other than those in projects of ten or more contiguous lots are excluded from its scope, the determination of the issue will depend upon whether there is a reasonable basis for the classification made by the legislation. Comment, 58 Colum. L. Rev. 728 (1958).

The Commission on Intergroup Relations has issued a "citizens guide" to promote understanding of the new law. This has been reprinted in 3 Race Rel. L. Rep. 566 (1958). See 3 Race Rel. L. Rep. 1076 (1958) for the Commission's report of the complaints which it has received during the brief period of the law's operation.

C. Public Accommodations

1. Earlier Anti-Discrimination Laws

The idea that there should be no discrimination based on race, creed, color, or national origin in the area of public accommodations is not new in the law. Expressions of such a principle are found in common law rules which long preceded the present day civil rights legislation.

> "The general public is regarded as having such an interest in certain classes of business conducted by private parties for their own profit as to impose, at common law, restrictions not applicable to the conduct of private business generally. Thus, all members of the general public are entitled to demand accommodations from inn-

keepers and carriers of passengers, provided they are ready and willing to pay a reasonable consideration therefor, and their character and conduct are unobjectionable." 10 Am. Jur. *Civil Rights* § 15 (1937). See also Prosser, *Torts* § 81 (1955).

Civil rights statutes generally embody this common law concept and extend it to include a variety of places of accommodation and amusement. There are many such laws, some of them fifty or more years old, but they are not directly within the scope of this study because they are not enforced by administrative agencies but rather provide for certain civil and criminal penalties for violations. However, such statutes continue to be a significant factor in the anti-discrimination movement, as is evidenced by several recent decisions. *Hobson v. York Studios, Inc.*, 145 N.Y.S.2d 162, 1 Race Rel. L. Rep. 379 (1955), is an example of a civil action to recover the statutory penalty for refusal by a hotel corporation to extend its accommodations to plaintiffs, a Negro and his white wife. The court found discrimination in this situation and awarded each plaintiff a judgment for $100. In *Browning v. Slenderella Systems of Seattle*, 2 Race Rel. L. Rep. 618 (1957), a reducing salon operator was found to have discriminated against plaintiff, a Negro woman, who had sought defendant's services and was refused. The court awarded $750 damages to plaintiff. *People v. Kavadas*, 1 Race Rel. L. Rep. 682 (1956), presented a situation in which the owner of a restaurant was charged with a criminal violation of Illinois' civil rights law in refusing to serve Negroes in his establishment. The court acquitted defendant of the charges in the information, however, on the ground that the refusal was actually made by an employee who had not been instructed to do so by defendant.

2. Commission Operations

Eight states (Colorado, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington) now have commission-enforced anti-discrimination laws in the area of public accommodations. The general procedure has been to extend the scope of activity of an already existing commission to include administration and enforcement of provisions prohibiting discriminatory practices in public accommodations. In four other states (Illinois, Maryland, Missouri, and Wisconsin) commissions without enforcement powers are also concerned with this area.

a. Places Generally Included

The definitive statutes are in general accord that the scope of the term "public accommodations" includes places which provide their facilities, services, entertainments, or products for the general public. Within this broad framework there are two distinct approaches employed in drafting the statutes. Massachusetts' definition of a place of public accommodation lists some forty specific places of accommodation, and in addition states that the term is not to be limited to the places named. Connecticut, on the other hand, simply states that "a place of public accommodation, resort or amusement within the meaning of this section shall mean any establishment, including, but not limited to, public housing projects and all other forms of publicly assisted housing, which caters or offers its services or facilities or goods to the general public." Conn. Gen. Stat. § 3267(d) (Supp. 1955). New Jersey, New York, Rhode Island, and Colorado have the list type statutes, while Washington and Oregon are to some extent more general.

Some of the specific places of public accommodations listed in the various anti-discrimination statutes are hotels, motels, trailer courts, theatres, bowling alleys, golf courses, taverns, night clubs, eating places, soda fountains, barber shops, beauty salons, bathhouses, swimming pools, hospitals, retail stores, public conveyances, elevators, and rest rooms. This list is not exhaustive but merely indicative of the all-inclusive scope of the term "public accommodations."

The rule of construction concerning civil rights statutes generally has been phrased as follows:

> "Except as to carriers and innkeepers, these statutes create a liability which does not exist at common law and, hence, are to be construed strictly. Where the law provides for equal accommodations in enumerated places, such as inns, eating houses, theatres, and public conveyances, and concludes with a general clause covering 'all other places of public accommodation and amusement,' the rule of construction is that no other places are included in the general term except those of the same general character as the places specifically enumerated." 10 Am. Jur. *Civil Rights* § 17 (1937).

b. Classification of Public and Private

As a matter of terminology, "public" accommodations would obviously appear to exclude anything which is "private" by nature. To insure clarity, however, New Jersey, New York, Oregon, Rhode Island, and Washington specifically exclude "any institution, bona fide club, or place of accommodation, which is in its nature *distinctly private.*" (Emphasis added.) *E.g.*, N. J. Stat. Ann. § 18:25-5(j) (Supp. 1957). Massachusetts, while phrasing the exclusion differently, seems to intend the same result from the following language:

> ". . . no place shall be deemed to be a place of public accommodation, resort or amusement which is owned or operated by a club or institution whose products or facilities or services are available only to its members and their guests . . . ." Mass. Ann. Laws c. 272 § 92A (1956).

The first case to be litigated in the state courts under New York's public accommodation law dealt with the determination of the "public" status of an organization charged with discrimination. In *Castle Hill Beach Club, Inc.* v. *Arbury*, 142 N.Y.S.2d 432, 1 Race Rel. L. Rep. 186 (1955), 144 N.Y.S.2d 747, 1 Race Rel. L. Rep. 382 (1955), 150 N.Y.S.2d 367, 1 Race Rel. L. Rep. 682 (1956), 142 N.E.2d 186, 2 Race Rel. L. Rep. 620 (1957), complainant was a Negro woman who alleged discrimination by the Castle Hill Beach Club in refusing her application for season locker facilities. The Club, a 16-acre bathing and recreation park, did not deny discriminating against complainant because of her color but contended that it should be regarded as a bona fide private club, which did not come within the purview of the public accommodations law. The trial court, however, upheld the cease and desist order issued by the New York Commission Against Discrimination, stating:

> "In effect, the commission found that the real parties in interest employed the device of a membership corporation to 'facilitate the exclusion of Negroes' . . . and thus continue a discriminatory practice in one of the largest places of public accommodation of its kind in the City of New York. The record amply justifies the conclusion that the petitioner [Castle Hill Beach Club] has never been a bona fide membership corporation. It has not functioned for the benefit of its members, whether 6 or 13,000 in number, but only to serve the interests and under the exclusive control of the landlord corporation and through it for the financial advantage of its stockholders." 142 N.Y.S.2d at 439, 1 Race Rel. L. Rep. at 190.

The trial court's determination that the club was in fact a place of public accommodation has been affirmed upon subsequent appeals by the club (citations *supra*).

New Jersey's Division Against Discrimination requested the Attorney General's opinion concerning whether summer camps operated by bona fide religious or sectarian institutions were places of public accommodations within the meaning of N.J. Stat. Ann. § 18:25-5(j) (Supp. 1957). In his opinion, reported in 1 Race Rel. L. Rep. 611 (1956), the Attorney General stated:

> ". . . if attendance at the camp is confined to the members of a bona fide religious or sectarian institution, it would be 'distinctly private' within the meaning of the exception. On the other hand, the camp would not be exempt merely because of its operation by an agency or institution which itself may be private. It is the nature of the facility in question, rather than the agency maintaining it, that determines whether or not the Law Against Discrimination is applicable." 1 Race Rel. L. Rep. at 612.

See also *Sun and Splash Club, Inc. v. Division Against Discrimination, Department of Education*, 3 Race Rel. L. Rep. 726 (1958), a New Jersey case involving a club which claimed to be "private" and therefore not subject to the subpoena power of the Division Against Discrimination. This case is discussed, *infra*, in connection with procedural matters. It is reported by the Anti-Defamation League of B'nai B'rith in its September–October, 1958, issue of *Rights* that the Sun and Splash Club has been ordered to cease discriminating on the basis of race, creed, color, or national origin (at 40).

Recently the Director of the Colorado Anti-Discrimination Commission stated that "places of public accommodation" include student rooming and boarding houses operated by the University of Colorado. Any discrimination by the University on the grounds of race, creed, color, national origin, or ancestry constitutes a violation,

as does referral of students to establishments which are known to practice discrimination, since such action on the part of the University would constitute aiding and abetting others in depriving the students of equal treatment. The University was commended by the Director for its cooperation in complying with the Anti-Discrimination Act. The Anti-Defamation League of B'nai B'rith and The American Jewish Committee, *Joint Memorandum* (Oct. 9, 1958).

c. Educational Institutions

Only two statutes, New Jersey's and Washington's, define "public accommodations" so as to include educational institutions. According to New Jersey's definition, "any public library, any kindergarten, primary or secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey" is a place of public accommodation [N.J. Stat. Ann. § 18:25-5(j) (Supp. 1957)], while Washington's definition includes "any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps" [Wash. Rev. Code § 49.60.040 (1957)]. Both statutes provide that the law is inapplicable "to any educational facility operated or maintained by a bona fide religious or sectarian institution," and to this New Jersey's statute adds:

> ". . . and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students." N.J. Stat. Ann. § 18:25-5(j) (Supp. 1957).

Concerning whether summer camps are educational facilities within the statute's meaning, the New Jersey Attorney General stated that "the statutory phrase 'educational facility' appears to have been used synonomously with the term 'educational institution', the ordinary meaning of which is a place where classes are conducted, such as schools and colleges." 1 Race Rel. L. Rep. at 612 (1956).

D. Education

Thus far the area of fair educational practices has not received the amount of attention devoted to the previously discussed areas. While ten states express concern in this problem, only Massachusetts, New Jersey, New York, Oregon, and Washington approach it with laws enforced by administrative agencies. Illinois, Maryland, Missouri, and Wisconsin have commissions with jurisdiction in this field, but they are not endowed with enforcement powers, relying entirely upon educational processes to eliminate and prevent discriminatory practices. Connecticut has no law relating to this field, but its Commission on Civil Rights has indicated general concern with educational practices.

Enforcement of New York's law is not vested in the New York State Commission Against Discrimination but in the Department of Education [N.Y. Educ. Law § 313(5)]. New Jersey's Division Against Discrimination, which is in the Department of Education, was given jurisdiction to combat discrimination in educational institutions in 1949 at the same time as the anti-discrimination statute was extended to include public accommodations. [N.J. Stat. Ann. § 18:25-6 (Supp. 1957)]. As noted, in the New Jersey and Washington anti-discrimination acts, educational institutions are included within the definition of "public accommodations." It was 1956 before Massachusetts transferred jurisdiction to enforce its Fair Educational Practices Law [Mass. Ann. Laws c. 151C § 1 (1957)] from the Board of Education to the Massachusetts Commission Against Discrimination. In 1957 Oregon extended the jurisdiction of its Civil Rights Division to include enforcement of the state's law which prohibits discrimination in vocational, professional, and trade schools [Ore. Rev. Stat. §§ 345.240, 345.250 (1957)].

The first complaint alleging discrimination by a Massachusetts educational institution involved an application by a Jewish girl from New Jersey to a Massachusetts junior college. In her application, complainant had used her "commonly accepted Jewish name," which allegedly had prompted the college's reply that its "quota from New York and New Jersey" had been filled. Three weeks later complainant's mother, using her maiden name which was not Jewish, had applied to the college and received an application blank in reply, no mention being made of any geographical quota. The Commission's

investigation of the college revealed that at the time complainant's mother applied there actually were vacancies which were not apparent when the complainant had applied earlier and that Jewish students were admitted to the college in large numbers (20-25%). The Commission directed the college to write an explanation to complainant and to enclose an application blank. The Commission also suggested that:

> "(1) The college avoid the use of the word 'quota' in correspondence relating to admission. When 'geographical quota' is meant, it was suggested that 'geographical distribution' might be substituted since the word 'quota' had acquired an unpleasant connotation and,
>
> "(2) application blanks be sent in reply to any inquiry even if an accompanying letter explains that enrollment has been completed as of that date." Case No. EDI-1-RC, 1956 Annual Report 11, 2 Race Rel. L. Rep. at 738 (1957).

A question of some concern in regard to unfair educational practices is whether an educational institution can require a photograph before the prospective student is accepted for admission. The Massachusetts Commission Against Discrimination requested the Attorney General's opinion on this point, in view of chapter 151C § 2(c) of the Massachusetts statute, which provides that it is an unfair educational practice for an educational institution:

> "To cause to be made any written or oral inquiry concerning the race, religion, color or national origin of a person seeking admission, except that a religious or denominational educational institution which certified to the commission that it is a religious or denominational educational institution may inquire as to the religious or denominational affiliations of applicants for admission."

The issue, then, is whether or not a photograph constitutes a "written . . . inquiry" within the meaning of the statute. Concluding that the requirement of a photograph is an unfair educational practice, the Attorney General said:

> "It appears that the statute is intended to prohibit the requirement of any form of information from which an educational institution might determine the race, creed, color or national origin of a student applicant. A picture could disclose the race, creed, color, or national origin of a person, information which the statute forbids and would appear to come within the reference to 'written . . . inquiry' prohibited in section 2(c) of said chapter 151C." 3 Race Rel. L. Rep. 797, 798 (1958).

IV. Functions

A. Education

The commissions recognize that the effectiveness of their operations may ultimately depend on education of the public in the means of improving human relations. The Director of Wisconsin's Governor's Commission on Human Rights has expressed that commission's feeling on this particular in the following terms:

> "We regard our educational functions as an asset rather than a liability. This puts us in contrast to quite a few groups and organizations in the country who believe that discrimination can only be removed by a show of strength and power and through an array of agencies fortified with large staffs, budgets, and laws 'with teeth in them.' Our contention is that you have to give people a chance to be on your side first, that this can best be done by education, and that the process doesn't have to last a hundred years." Barton, *Our Human Rights* 13 (1955).

Although all commissions are not in agreement that laws with enforcement powers are not essential, the various reports indicate that educational devices are considered to be salient factors in a commission's effectiveness. In this connection the 1957 Annual Report of Maryland's Commission on Interracial Problems and Relations stated:

> "It is questionable whether the current agitation for civil rights legislation in itself or of itself can serve as a 'cure-all.' Certainly recent legislation and court rulings would indicate that something else is

needed. *It might well be that greater effort should be directed toward education and conciliation* as a means of bringing the rights of a minority into a more acceptable focus for the majority." (Emphasis added.)

In *Castle Hill Beach Club, Inc. v. Arbury*, 142 N.Y.S.2d 432, 1 Race Rel. L. Rep. 186 (1955), Justice Frank pointed up the importance of education in the following language:

> "No one can reasonably believe that deep-rooted prejudices can be legislated into oblivion or that they are susceptible of cure by law alone, but there can be no doubt that effective legal procedures coupled with educational processes will narrow the areas where bigoted practices exist and bring the higher concepts of democracy nearer to fulfillment." 142 N.Y.S.2d at 440, 1 Race Rel. L. Rep. at 191.

Pointing out a different phase of the educational program to promote equal rights, Dr. Frank S. Horne, Executive Director of the New York City Commission on Intergroup Relations, in an address delivered on October 9, 1958, at the Conference of the United Neighborhood Houses of Up-State New York emphasized the educational challenge of assisting minority families to "overcome the inertia of segregation," as he said:

> "One of the greatest challenges to attitudes, however, confronts the minorities themselves. And it is here where some may think the greatest efforts at education should be made. We have reached the point of transition in our nation, and especially in enlightened sections such as New York State, where many doors have been unlocked and need only to be tried in order to be opened."

Among the many educational functions of the commissions are research and fact-finding, the publication of such findings, public speaking engagements by the commissioners, participation in radio and television programs, cooperation with other public and private agencies, publication of explanatory materials concerning civil rights, and numerous other activities which are designed to inform the citizen regarding his rights under the law and how he should proceed in enforcing them. It is the hope of the commissions, particularly those without the additional powers of enforcement, that their educational operations will convert public attitudes and practices from discrimination to at least toleration.

B. Enforcement

All of the state commissions employ substantially the same procedural processes in handling complaints. However, those agencies which do not have enforcement powers can only go as far as the conciliation and persuasion stage, whereas those having powers of enforcement are authorized to conduct formal hearings which conclude with either a dismissal of the complaint or a cease and desist order.

1. Who May File Complaints

There is a considerable variance among the states concerning who, other than the aggrieved party, may file a complaint. Specific details are shown in Table III.

2. Processing Complaints

(a) Investigation

When a complaint containing the name and address of the respondent, the particulars of the alleged discrimination, and other information which may be required is filed with a commission, it is usually investigated by a designated commissioner, whose function it is to determine whether probable cause exists as alleged in the complaint. *Sun and Splash Club, Inc. v. Division Against Discrimination, Dept. of Education*, 3 Race Rel. L. Rep. 726 (1957), raised the novel problem of whether the commission's subpoena power can be used in a preliminary investigation under the New Jersey law. Pursuant to complaints received from eight Negroes who alleged that swimming privileges had been denied to them by the Sun and Splash Club on the ground that it was a "private club," the Division sought to subpoena certain records necessarily involved in determining whether the club was private in nature or a place of public accommodation. The instant action was initiated by the club in an effort to have the subpoena quashed. The procedural point at issue was whether the Division could exercise its subpoena power prior to attempts at conciliation and persuasion. The club insisted that the Division should have attempted to conciliate before issuing the subpoena, while the Division contended that it needed to know whether or not Sun and

Table III: Who May Complain?

STATE	Aggrieved Party	Commissioner or Commission	Attorney General	Private Organizations	Public Officials	Employer[1]
Colorado	x	Commission or Commissioner	x			x or labor organization
Connecticut	x	Commission				x
Massachusetts	x	Commission	x			x
Michigan	x					x
Minnesota FEPC	x	Commission				x or labor union
New Jersey	x		x		Commissioner of Labor	x
New Mexico	x[2]		x		Industrial Commissioner	x
New York	x		x		Industrial Commissioner	x
Oregon	x		x			x
Pennsylvania	x	Commission	x			x
Rhode Island	x	Commission		x[3]		
Washington	x	Board of Review				x or principal
Wisconsin Industrial Com'n[4]						

1. Any employer whose employees or any of them refuse or threaten to refuse to comply with the provisions of the act.
2. "Or any associate or person on his behalf."
3. An organization chartered for the purpose of combating discrimination or racism, or of safeguarding civil liberties, or of promoting full, free, or equal employment opportunities.
4. The Commission may receive and investigate complaints, but the statute does not specify who can initiate complaints.

Splash was a place of public accommodation, and thus subject to the law, before it proceeded to the conciliation and persuasion stage. Judge Artaserse dismissed the club's complaint and held that the subpoena was proper. It is noteworthy, however, that he made the following admonition:

". . . I think that the Division against Discrimination of the Department of Education, and John P. Milligan [Assistant Commissioner of Education], ought to pursue the matter cautiously. I think that maybe it would not be required that all of the things listed in the subpoena are neces-

sary, and I do not think that the Sun and Splash Club . . . ought to be unduly oppressed, or harassed . . . ." 3 Race Rel. L. Rep. at 733 (1957).

(b) Conciliation

If the preliminary investigation does not reveal probable cause, the complaint is dismissed; if probable cause is found, attempts are made to eliminate the unlawful practice by conference, conciliation, and persuasion. "The conciliation process affords the . . . respondent charged with discrimination an opportunity to bring his . . . practices and methods into compliance with the law without stigma and without shock." Carter, *Policies and Practices of Discrimination Commissions*, The Annals of the American Academy of Political and Social Science 8 (March, 1956). The term "conciliation" comprehends not only the elimination of unlawful practices but also the prevention of their recurrence. In order to achieve these goals, it is necessary for the investigating commissioner to know when and where to compromise. This point is well stated as follows:

> "The process of conciliation is necessarily an adjustment of differences. It demands the clarity of head to know when to give way and when to stand firm. It demands the courage to stand absolutely firm on points which matter and to give way with good grace on points which do not. The essence of the conciliation process is compromise. Compromise does not signify retreat because one is too timid to press one's convictions, nor does it signify moral inertia. Compromise is an essential requirement of the law, necessitated, among other things, by the difficulty of proving discrimination even when one has found probable cause to credit the allegations of a complaint." Spitz, *Patterns of Conciliation Discrimination*, 125 N.Y.L.J., No. 71 (April 12, 1951).

The conciliation agreement itself is usually informal, and consummates an interchange of correspondence between the investigating commission and the respondent or its representative and a series of conferences during which the basic agreements were reached.

(c) Formal Disposition

If no settlement is made as a result of conciliation, in those states where enforcement procedures are provided the matter is presented before a hearing tribunal, usually composed of the entire commission or some of its commissioners appointed for the occasion (see Table IV for the variances in this particular), excluding the investigating commissioner who does not participate in the hearing except as a witness. The hearing is not bound by the strict rules of evidence usually employed in courts of law or equity. It is a rather liberal proceeding allowing for amendments by both parties.

If, after the presentation of all the evidence before the hearing tribunal, it is found that there has been discriminatory practice, the commission is empowered to issue a cease and desist order; otherwise the complaint will be dismissed.

A commission order is subject to judicial review, usually by a county court. Generally either the complainant or respondent can appeal from the commission's decision; however, Connecticut's law provides for appeal only by the respondent. Several statutes provide that once appeal is made to a state court, the case is to be tried expeditiously by having precedence over other matters before the court. (See Table IV).

Massachusetts, New Jersey, and New York provide that a person guilty of wilfully violating an order of the commission or commissioner shall be punishable by imprisonment for not more than one year and/or a fine of not more than five hundred dollars. Pennsylvania's statute provides for imprisonment for not more than thirty days and/or a fine of not less than one hundred dollars nor more than five hundred dollars for a wilful violation of a commission order. Wisconsin's Fair Employment Practices Law provides that every day during which one fails to comply with a commission order shall constitute a separate violation and that for each violation a sum of not less than ten dollars nor more than one hundred dollars shall be paid into the state treasury. Violations under this law also include failure or refusal to obey a court judgment or decree rendered in connection with an action under this law. Washington's law merely states that it is a misdemeanor to violate an order of the Board, while Oregon's statute prohibits violation of an order but does not provide for any penalty. The Minnesota law provides imprisonment for not more than six months and/or a fine of not more than two hundred and fifty dollars for contempt by wil-

fully violating an order of the district court entered pursuant to a proceeding under its Fair Employment Practices Act.

Since Minnesota's administrative procedure differs from that of the other states, it will be noted in particular. It is unique in that there is created by the Fair Employment Practices Law a special Board of Review which conducts public hearings of cases that have not been settled by the conciliatory efforts of the commission. When the Commission fails to eliminate an unfair employment practice, it so notifies the governor in writing and requests the appointment of a three-member Board of Review to be drawn from a previously selected twelve-member panel of citizens. One member of the Board must be an attorney. With the Commission presenting the complainant's side, this Board hears the case and then makes a final determination on the basis of the evidence presented. Enforcement powers are lodged with the Board of Review rather than with the Fair Employment Practices Commission, which means that the Board will either issue a cease and desist order or dismiss the complaint. However, if the Board order is not complied with, it is the Commission which has the power to institute an action in the district court of the county to secure compliance. As in other states, the Board's decision is subject to judicial review by a lower state court (here, the district court of the county), on appeal by either the complainant, respondent or Commission. Only the Commission or respondent may appeal to the supreme court from the district court order. Wilful violation of a district court order constitutes contempt of court, punishable by a fine of not more than two hundred and fifty dollars or not more than six months imprisonment or both.

3. Who May Enforce Commission Order

Securing court enforcement of a commission order is not handled uniformly by the states, although in all states concerned the commission itself may obtain a court decree for enforcement of its orders. For variations of this procedure in the different states see Table IV which also includes other statistical information concerning judicial review.

4. Judicial Review of Commission Orders

Certain aspects of the administrative procedures have been brought into focus as a result of statutory interpretations by the courts.

In *Jeanpierre v. Arbury*, 1 Race Rel. L. Rep. 685 (1956), 162 N.Y.S.2d 506, 2 Race Rel. L. Rep. 627 (1957), 173 N.Y.S.2d 597, 3 Race Rel. L. Rep. 502 (1958), the leading New York case concerning the question of a review of a commission's preliminary investigation of a complaint, the complainant alleged discrimination by Pan American World Airways System, in denying him employment on account of race or color. Since the investigation by the New York State Commission Against Discrimination did not reveal any racial discrimination, the complaint was dismissed. Complainant then petitioned the New York Supreme Court for review of the Commission's determination. In affirming the Commission's action, the court said, "Judicial intervention is possible only if there were ample evidence to show that petitioner was rejected solely because of his color." Upon Jeanpierre's appeal to the Appellate Division, it was held that a preliminary decision was not subject to review by a state court, the judicial review provision being interpreted as follows:

> ". . . Section 298 of the Executive Law does not provide for judicial review of all acts of the commission, but only of such orders as are made by the commission after a formal hearing at which testimony is taken under oath . . . . The commissioner's initial determination dismissing the complaint without a hearing was not such an order, since it is undisputed that the commission did not publish findings of fact or conclusions of law, nor did it hold any hearing at which testimony was taken under oath." 162 N.Y.S.2d at 509.

The New York Court of Appeals finally resolved the matter by holding that a preliminary investigation was subject to review in so far as the record revealed an abuse of discretion by the New York State Commission Against Discrimination. No such abuse was found in this case, however, and so the Commission's dismissal of the complaint was upheld.

Six states (Massachusetts, Michigan, New Jersey, New York, Oregon, and Pennsylvania) provide that "any person aggrieved" can appeal from a commission order. Massachusetts, Michigan, New York, and Pennsylvania specify in addition that either the complainant or the respondent can appeal. It appears that "person aggrieved" would be the same in either type

TABLE IV: Judicial Review of Complaints

STATE	Complaint must be filed within	Administrative hearing tribunal	Who may appeal?	Court to which appeal is made	Specific provision for expeditious hearing in state court	Who may obtain court enforcement of Commission[1] order?	Appeal must be made within
Colorado	6 months	Commission, Commissioner or Commissioners, or Person designated by Commission	Complainant Respondent	District Court of County	x	Commission	30 days
Connecticut	6 months	Three persons (Commissioners or hearing examiners)	Respondent	Superior Court of County		Commission through Attorney General	2 weeks
Massachusetts	6 months	Commission	Complainant Respondent Others aggrieved	Superior Court of County	x	Commission	30 days
Michigan	90 days	One or more hearing Commissioners or Examiners as designated by Chairman	Complainant Respondent Others aggrieved	Circuit Court of County		Commission	30 days
Minnesota FEPC	6 months	Board of Review	Complainant Respondent Commission	District Court of County		Commission Complainant Respondent	60 days
New Jersey	90 days	Commissioner of Education	Any person aggrieved	County Court[2]		Suit for specific performance[3]	30 days
New Mexico		Any Commissioner (other than investigator) or qualified examiner	Complainant Intervenor Respondent	District Court of County	x	Commission	30 days
New York	90 days	Chairman appoints three commissioners	Complainant Respondent Others aggrieved	Supreme Court of County	x	Commission	30 days
Oregon		Commissioner of Labor	Any party aggrieved	Circuit Court of County	x	Mandamus, injunction, or by a suit in equity for specific performance[3]	20 days

Pennsylvania	90 days	Commission	Complainant Respondent Others aggrieved	Court of Common Pleas of Dauphin County		Complainant Attorney General Commission	30 days
Rhode Island	1 year	Commission, a Commissioner, or a hearing examiner	Complainant Intervenor Respondent	Superior Court of County		Commission	30 days
Washington	6 months	Chairman appoints three members of Board or panel of hearing examiners	Respondent Complainant	Superior Court of County	x	Board	2 weeks
Wisconsin Industrial Commission		Commission	Complainant Respondent Commission	Circuit Court of Dane County		Any person aggrieved—Specific performance in equity	30 days

1. Includes hearing tribunal, by whatever name designated.
2. See *Sun and Splash Club, Inc. v. Division Against Discrimination, Dept. of Education*, discussed *supra* p. 1100.
3. Statute does not specify what party may seek enforcement.

of statute. *New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc.*, 171 N.Y. Supp. 558, 3 Race Rel. L. Rep. 518 (1958), presented the New York Supreme Court of Westchester County with the question of whether three tenants of an apartment building, the management of which had been ordered by SCAD to cease discrimination, were persons "aggrieved" by the order and thus entitled by the statute to intervene for the purpose of opposing the enforcement of the order. The court held that they were not affected "in any property or other legal rights" by the Commission's order, and, therefore, were not "aggrieved" within the meaning of Executive Law § 298.

Dictum in the *Sun and Splash Club* case, *supra*, calls into question the correctness of the anti-discrimination law's provision for appeal from an agency ruling to the New Jersey County Court. The following discussion by Judge Artaserse and Mr. Cook, attorney for the Division, indicated the doubt concerning the proper court to which appeal should be made:

"The Court: . . . I take it that the Division against Discrimination, Department of Education, is a State Administrative Agency, and the plaintiff in this case would always have a right to an appeal to the Appellate Division from any determination by that agency.

Mr. Cook: Oh, yes, Your Honor. I believe in our statute an appeal from a determination of the Commissioner goes to the County Court in the first instance, but there is a right of appeal.

The Court: To the County Court? Because our rules provide, don't they, that all appeals from State Agencies go to the Appellate Division of the Superior Court?

Mr. Cook: That is correct. As a matter of fact I am not sure which Court it would go to. The Rules say you can go to the Appellate Division. We haven't had an appeal yet under this.

The Court: Saulsberry v. Winberry, or Winberry v. Saulsberry, if it means anything, I am afraid that the provision in the statute does not apply, and you would have to conform with the rules of the Court, and you would have to go directly, or rather, the offended or aggrieved party would have to go directly to the Appellate Division." 3 Race Rel. L. Rep. at 728 (1958).

V. Local Commissions

A. Existence of Local Authority

While a considerable number of local anti-discrimination commissions are in operation in municipalities in the various states, the authority of local governments to carry on such a function is the subject of some doubt. It is generally conceded that a municipal government is not vested with inherent powers, but rather derives its power from the state. A municipality's powers are either expressly granted, necessarily implied from those expressly granted, or necessarily implied as essential to the municipality's object. The state may confer express powers to local government by express words in its special charter or by specific enumeration of powers in the general laws under which the municipality may obtain its charter, or by a home-rule constitutional amendment.

The movement to combat discrimination by commissions in the various areas of human relations is relatively recent, and, therefore, most states have not expressly granted powers authorizing municipalities to operate in this field. Not having an express authorization, a non-home-rule municipality must rely upon implications of such general charter terms as the general welfare clause, which customarily is construed strictly. 1 Antieau, *Municipal Corporation Law* § 5.06 (1955).

A home rule city is in somewhat more favorable position, inasmuch as it derives its powers from the state constitution and basically has all power over matters of local concern. In this connection, however, the following is pertinent:

> "The courts have, generally speaking, been unable to devise any objective test whereby it can be determined with certainity what matters come within the term 'municipal affairs,' for the term has no fixed quantity, fluctuates with every change in conditions upon which it operates, and has of necessity been determined by a slow process of judicial inclusion and exclusion." Rhyne, *Municipal Law* § 4-3 (1957).

While discrimination is obviously a matter of direct interest within the municipality, it is probably beyond mere local concern and ranks as a matter of state-wide interest. If this be true, a home rule city is in the same position as an ordinary city in this respect, and so must have express or implied power to function in this field. As in the case of the ordinary city, the home rule city must usually rely upon its general welfare clause; however, there has been a tendency to construe these clauses more liberally in the home rule states. 1 Antieau, *Municipal Corporation Law* § 5.06 (1955).

As far as is here known, Philadelphia, a home-rule city, is the only city in the United States whose charter expressly provides for the establishment of a human relations agency. Philadelphia, Pa., Home Rule Charter § 3-100.

No state court thus far has taken occasion to construe a municipal anti-discrimination ordinance based on powers impliedly derived from a general welfare clause. Kansas is one of the exponents of the view that a municipality takes no power by implication and that the only power acquired in addition to an express grant is that which is necessary in effecting the power specifically conferred, Rhyne, *Municipal Law* § 4-7 (1957). The Attorney General has stated that a Kansas municipality may not enact an ordinance prohibiting discrimination in places of public accommodation until it has specifically been granted such power by the state legislature. 2 Race Rel. L. Rep. 557 (1957).

B. Pre-emption by State

It appears that a municipality's activity in the field of human relations is subject to attack from at least two directions. First, a respondent against whom a complaint has been registered may challenge the power of a local government to operate in this area of state-wide interest without express authority. This situation has apparently not arisen thus far, but is potentially present.

Second, the state may legislate in the anti-discrimination field and thus claim to have pre-empted it, to the exclusion of local authority. Thus far the attorneys general of Michigan and New Jersey have declared that their states have so "occupied the field" of human relations legislation. The opinion of the Attorney General of Michigan, reported in 3 Race Rel. L. Rep. 798 (1958), was requested relative to the validity of certain city ordinances enacted prior to the

Michigan Fair Employment Practices Act of 1955. In concluding that city ordinances were superseded by the state statute, he declared:

> "We think it clear that the complete machinery provided by this legislation can function clearly and effectively only if unthwarted and unconfused by competing and duplicating mechanisms previously established by local ordinances. Where, as here, a state statute asserts plenary control of the subject matter of the legislation, it must follow that city ordinances dealing with such subject matter are void. The state has 'pre-empted' the field, in the sense that the authority to be exercised under the act is plenary, leaving nothing in that respect to local municipalities for regulation pursuant to the police power." 3 Race Rel. L. Rep. at 801 (1958).

Of the states included in this study, only Pennsylvania has expressed its legislative intent in the state statute. Pennsylvania chose not to pre-empt the field, and expressly provided that:

> "Nothing contained in this act shall be deemed to repeal any of the provisions of any municipal ordinance, Municipal Charter or of any law of discrimination because of race, color, religious creed, ancestry, age or national origin . . . ." Pa. Stat. Ann. tit. 43, § 962(b) (Supp. 1957).

What the other states will do concerning pre-emption of the field is necessarily a matter of conjecture. One authority on municipal government law has expressed his opinion in this whole matter as follows:

> "It is the conclusion of the author that the occupation of the field doctrine should be discarded. If the matter is a general one in a home rule state, or any kind elsewhere, the legislature can prevent further municipal regulations by simply indicating its wish. In the absence of such specific indication of the legislative intent the judiciary would be well advised to avoid invalidating municipal ordinances upon inquiries into the legislative psyche. The doctrine may provide a too handy prop for invalidating municipal rules with which jurists are unsympathetic. One cannot help but notice how avidly courts invalidate municipal regulations in one 'field' on the theory that it had been occupied, while condoning considerable complementary regulation in another. Since it is practically impossible for either municipal attorney or private counsellor to determine in advance what is the 'field' and to forecast whether one has been 'occupied' the doctrine is unserviceable to the bar." I Antieau, *Municipal Corporation Law* § 5.22 (1955).

C. Cooperation

Where a local commission is operating in a state which also has a commission, some arrangements must be made to insure a cooperative co-existence. This is particularly true in situations in which both the state and local agencies have enforcement powers, but does not constitute a great problem in the pre-emption states where local commissions continue operations only at the educational level. Likewise the problem does not exist where there is a local agency and no state agency, the local agency confining its activities to its local jurisdiction.

Annual reports of both state and local commissions indicate that a spirit of cooperation quite generally exists, particularly in exchanging information, in joint educational functions, in joint programs and conferences, and in joint projects. One example of a joint project is evidenced in *The Report of a Study on Desegregation in the Baltimore City Schools* (1956), which represents an effort by the Maryland Commission on Interracial Problems and Relations and the Baltimore Commission on Human Relations. These commissions present a unique situation, however, in that they have virtually the same membership.

One example of efforts to provide a basis for peaceful co-existence between the state and local agency is illustrated by the Pennsylvania Fair Employment Practice Commission–Philadelphia Commission on Human Relations "Memorandum of Agreement," which is, in the words of the Agreement "in the nature of a 'Memorandum of Understanding' and not construed as a fixed or formal agreement." The Memorandum sets forth the general principles which are to guide the two commissions and also certain procedural details which are to be applied in specific cases. In essence the general principles are that the state will concentrate its efforts where there is no local agency, on the assumption that the

local agency can take care of its work, and that the state and local commissions will cooperate fully in educational efforts. The agreement relative to procedural details is considered from two standpoints, concurrent and non-concurrent cases. Concerning concurrent jurisdiction, the complainant ultimately chooses which agency shall act in his behalf; however, there will be a general effort to channel cases which have primary contacts in Philadelphia to the local agency and cases which have some contacts in the city but primary contacts outside the city to the state agency. In either situation, however, the referral from one agency to the other should, whenever possible, be made prior to any investigations. Concerning non-concurrent jurisdiction, there are certain automatic referrals by one agency to the other. For example, the state automatically will refer a complaint involving a Philadelphia employer who has less than twelve employees because such an employer is not within the state's coverage. Many additional details are covered in the Memorandum of Agreement.

TABLE OF CASES
Cumulative, 1958

IN THIS LISTING the official style of each case in the five 1958 issues and its citations, if any, appear in *italic* type. The reverse citations are in Roman type. A complete table of cases for the first two volumes of RACE RELATIONS LAW REPORTER appears at 2 Race Rel. L. Rep. 1233.

VANDERBILT LAW REVIEW

Symposia on Trade Regulations and Practices

PART I, DECEMBER, 1957

EDWARD MORRISON: Commercial Restrictions in English Law

G. W. HAIGHT: Antitrust Laws and the Territorial Principle

J. W. BURNS: Legal, Economic and Political Considerations involved in Mergers

REYNOLDS C. SEITZ: Exclusive Arrangements and Refusal to Deal Problems

HOMER CLARK: Statutory Restrictions on Selling Below Cost

KENNETH S. CARLSTON: Senate Bill No. 11 and Antitrust Policy

JAMES A. MACLACHLAN: A New Approach to Resale Price Maintenance

LEE LOEVINGER: The Lawyer's Role Before Litigation

THOMAS W. CHRISTOPHER: Federal Control in the Food and Drug Industries

ARTHUR MILLER: State Power over the Federal Contractor: A Problem in Federalism

PART 2, MARCH, 1958

HEINRICH KRONSTEIN: Cartels Under the New German Cartel Statute

PHILIP MARCUS: The Impact on Business of Antitrust Decrees

JESSE W. MARKHAM: Concentration in American Industry and the Antitrust Laws

WILLIAM H. FISHER, III: Sections 2(d) and (e) of Robinson-Patman Act: Babel Revisited

WRIGHT PATMAN: For H.R. 11 and S. 11: To Strengthen the Robinson-Patman Act and Amend the Antitrust Law Prohibiting Price Discrimination

HARRY KEMKER: The Legality of Trade Association Statistical Reporting Under the Antitrust Laws

J. E. BAKER: Trading Stamps

J. A. HART: Dupont-General Motors Case

W. EDWARD SELL: The Doctrine of Misappropriation in Unfair Competition: The Associated Press Doctrine After Forty Years

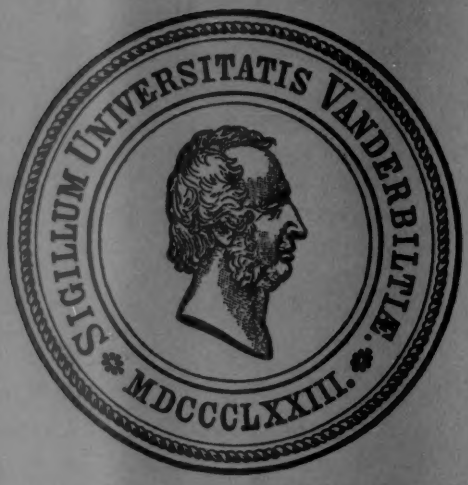
VERNON A. MUND: Refusal to Sell

CARL FULDA: Competition versus Regulation: § The Agricultural Exemption in the Motor Carrier Act

RUDOLPH CALLMAN: Worldmarks and Antitrust Law

LEONARD S. ELMAN: The Limits of State Jurisdiction in Affording Common-Law Protection to Clothing Designs

Symposium issues sell for $2.00 each plus 15 cents postage and handling on single orders. There is no postage charge on orders for three or more. A subscription to Volume 11, which includes the 2 symposium issues on Trade Regulations and Practices, is $5.00. Send your orders to the Vanderbilt Law Review, Vanderbilt University, Nashville 5, Tennessee.


SIGILLUM UNIVERSITATIS VANDERBILTIA
MDCCCLXXIII